-1060

JAN 7 1974

MICHAEL RODAK, JR., C

IN THE

Supreme Court of the United States

No. 73-1060

VILLAGE BOOKS, INC., AND GARY WAHL,
Petitioners,

v.

ARTHUR MARSHALL, JR., State's Attorney for Prince George's County, Maryland,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

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IN THE

Supreme Court of the United States

No.

VILLAGE BOOKS, INC., AND GARY WAHL,
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v.

ARTHUR MARSHALL, JR., State's Attorney for Prince George's County, Maryland,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

Petitioners pray that a Writ of Certiorari issue to review the judgment of the Court of Appeals of Maryland entered in the above entitled case on October 13, 1971, which was remanded by this Court on June 25, 1973 and reaffirmed by the Court of Appeals of Maryland on October 10, 1973.

OPINIONS BELOW

The Respondent filed in the Circuit Court for Prince George's County, Maryland, on January 11, 1971, an Application for an injunction restraining the sale of one hundred (100) different books and magazines, which the Respondent alleged to be obscene. On February 8, 1971, Judge Powers of the Circuit Court for Prince George's County, Maryland, announced his oral Opinion declaring eighteen (18) of the one hundred (100) books and magazines to be obscene, and an Order enjoining their sale and directing their destruction was entered. The Court's oral Opinion is unreported but appears at Record Page (A. 14) and the Injunction appears at Record Page (A. 9). The Petitioners appealed to the Court of Appeals of Maryland and the action of the lower Court was upheld as to five (5) of the eighteen (18) books in a written Opinion filed October 13, 1971, which is reported at 282 A.2d 126, 263 Md. 76. This Court remanded on June 25, 1973, No. 71-739, ___ U.S. ___, 93 S.Ct. _____, 37 L.Ed.2d 1024. The Court of Appeals of Maryland reaffirmed on October 10, 1973, ___ Md. ___, ___ A.2d ___, Record Page A. 21.

JURISDICTION

The judgment of the Circuit Court for Prince George's County, Maryland was entered on February 8, 1971, pursuant to Article 27 of the Annotated Code of Maryland, §418(a). The Opinion of the Court of Appeals of Maryland affirming the holding of obscenity of five (5) magazines was entered on October 13, 1971, and reaffirmed on October 10, 1973. The jurisdiction of this Court is invoked under 28 U.S.C.A., §1257, (2, 3); 2101(c).

QUESTIONS PRESENTED

1. Is Prince George's County, State of Maryland, the proper community to be exclusively considered in determining whether or not books and magazines exceed contemporary community standards of candor in the expression of sexual matters in erotic literature or is proof of a statewide community standard mandatory?

2. Are the five (5) magazines, "Sex Confidential", "Masturbation and Youth"; "Auto-Fellatio and Masturbation"; "Ted & Blair"; Allen & Jim", obscene in the constitutional sense without the Maryland Code specifically defining "obscenity" and without judicial construction by the Court of Appeals of Maryland

3. Is the statute, Article 27, Annotated Code of Maryland, §417, §418 and §418(a), unconstitutional as banning obscenity which has not been specifically defined as written or judicially construed.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the First and Fourteenth Amendments to the Constitution of the United States of America and the provisions of Article 27, Annotated Code of Maryland, §417, §418 and §418(a), are set forth in the Appendix hereto at Pages (A. 22-25).

STATEMENT OF THE CASE

On or about January 4, 1971, the Petitioners, through counsel, notified the Respondent that Petitioners intended

to open an adult bookstore in Prince George's County, Maryland. Thereafter, the Petitioners furnished the Respondent with one hundred (100) samples of the types of books and magazines which the Petitioners desired to sell at the adult bookstore which was to be located in the Shopping Center adjoining Andrews Air Force Base. On January 11, 1971, the Respondent obtained an *Ex Parte* Injunction restraining the sale of all of the magazines, books, and stories, pictures, photographs, and motion pictures by the Petitioners. The case was set for trial upon the non-jury calendar, on February 2, 1971. The Circuit Court for Prince George's County, Maryland, Judge Ralph Powers, in chambers, on that date denied the Petitioners' Motion to Dismiss the Complaint made upon the grounds that the Maryland Code provision was repugnant to the Constitution of the United States of America. The Respondent then amended the Complaint, reducing the number of books and magazines alleged to be obscene from one hundred (100) to twenty-one (21). At the trial, the twenty-one (21) books and magazines were admitted in evidence (Appendix P. A. 12), and the Respondent rested, alleging that all twenty-one (21) books and magazines constituted hard core pornography, and therefore, no further testimony was required to prove the Respondent's case-in-chief.

The Petitioners then moved the Court to dismiss the Complaint, (Appendix A. 13), which Motion was denied. The Petitioners then produced psychiatric testimony to the effect that the books and magazines would not be appealing to the prurient interest of the average person, and that the books and magazines were sold in large numbers throughout the United States at adult bookstores.

On February 19, 1971, the Circuit Court for Prince George's County, Maryland, rendered its Opinion, holding eighteen (18) of the twenty-one (21) books and magazines to be obscene and entered an Injunction prohibiting their sale and requiring their destruction, (Appendix Pages A. 14 through A. 20 & A. 4 through A. 5). In determining obscenity, the Circuit Court for Prince George's County, Maryland, applied his personal opinion of what was the local community standard for Prince George's County, Maryland, specifically excluding a national community standard or statewide community standard, (Appendix Page A. 19), all without the benefit of any expert testimony relating to prurient appeal, community standards of redeeming value. This decision was appealed to this Court in Case No. 71-739 and on June 25, 1973, this Court granted Certiorari and remanded to the Court of Appeals of Maryland for reconsideration in light of *Miller v. California*, and its companion cases. On remand, the vagueness of the statute was briefed, as well as the issue of the size of the territory for determining community standards, but the Court of Appeals reaffirmed without clarification or opinion, (Appendix Page A. 21).

HOW FEDERAL QUESTIONS ARE PRESENTED

At the trial in the Circuit Court for Prince George's County, Maryland, the Petitioners raised as issues the necessity to produce expert testimony relating to alleged prurient appeal and the community standard of tolerance relating to the depiction of sex to literary materials. Prior to trial, the Petitioners filed a Motion to Dismiss, challenging the constitutionality of Article 27, Annotated Code of Maryland, §418(a), as being repugnant to the

First Amendment to the Constitution of the United States of America. In addition thereto, Petitioners urged the Circuit Court for Prince George's County Maryland, to hold that the books and magazines herein involved were protected by the First Amendment to the Constitution of the United States of America, and not obscene. Following the decision of the Circuit Court for Prince George's County, Maryland, enjoining the sale of the books and magazines involved and ordering their destruction, the Petitioners filed a timely Appeal to the Court of Appeals of Maryland, raising the following points in the original briefs and on reconsideration following this Court's remand in consideration of *Miller v. California:*

(1) Are the books and magazines herein involved constitutionally protected?

(2) Is Prince George's County, State of Maryland, the proper community to be exclusively considered in determining whether or not books and magazines exceed contemporary community standards of candor in the expression of sexual matters in erotic literature, or is it necessary to prove that the literary materials exceed the statewide community standards?

(3) Is the Statute, Article 27, Annotated Code of Maryland, §417, §418 and §418(a), unconstitutional?

The Court of Appeals of Maryland, on October 13, 1971, in a written Opinion reported at 282 A.2d 126, 263 Maryland 76, affirmed the Circuit Court for Prince George's County, Maryland, concluding that the five (5) books and magazines, "Sex Confidential", "Masturbation and Youth", "Auto Fellatio and Masturbation", Ted & Blair", and "Allen and Jim"; were obscene. The Court

of Appeals of Maryland upheld the constitutionality of the Statute, although stating that it had been unconstitutionally applied in this case.

The Court of Appeals of Maryland, upon remand from this Court for reconsideration in light of *Miller v. California*, and its accompanying cases, merely reaffirmed its prior decision without in any way attempting to construe the Maryland Statute. All prior construction of the Maryland Code had applied the *Roth v. U.S.*, 354 U.S. 476 and *Memoirs v. Massachusetts*, 383 U.S. 413, standards. The General Assembly of Maryland has not attempted to define the word "obscene" as used in the Maryland Code and therefore, the law in the State of Maryland is unconstitutionally vague.

The Court of Appeals of Maryland did not answer the Petitioner's question relating to the geographical limitation of the territory to be considered in establishing community standards of tolerance in the expression of sexual matters in erotic literature to be a local standard, rather than a statewide standard, all in violation of the First and Fourteenth Amendments to the Constitution of the United States of America.

REASONS FOR GRANTING THE WRIT

I. The books and magazines; "Sex Confidential", "Masturbation and Youth"; Auto Fellatio and Masturbation"; "Ted & Blair"; and "Allen and Jim"; are protected by the First Amendment to the Constitution of the United States of America and not obscene as a matter of law.

These books and magazines were condemned as being obscene pursuant to a criminal statute in a quasi-criminal-

civil injunction proceeding, the procedure authorized in Article 27, Annotated Code of Maryland, §417, §418 and §418(a). Prior to this Court's decision of June 21, 1973, in *Miller v. California*, ____ U.S. ____, 93 S.Ct. 2607, 37 L.Ed.2d 419, the Court of Appeals of Maryland and the Court of Special Appeals of Maryland, in construing the term "obscene" as contained in the statute, have applied the *Roth-Memoirs* definition, *Donnenberg v. State*, 1 Md. App. 591, 232 A.2d 264, and *Monfred v. State*, 226 Md. 312, 173 A.2d 173. The Court of Special Appeals of Maryland has interpreted the word "obscene" to connote that which the word "obscene means in prevailing leading legal thought, *Woodruff v. State*, 11 Md. App. 202, 273 A.2d 436. On November 6, 1973, the Court of Special Appeals of Maryland decided *Ebert v. Maryland State Board of Censors*, ____ A.2d ____, ___ Md. App. ____, No. 172 September Term, 1973, and stated,

> "The criteria of a tendency to debase or corrupt morals and to incite to crime have heretofore been declared invalid on constitutional grounds by judicial decision. Dunn v. Board of Censors, 240 Md. 249, 252-254. 'The only valid standard for disapproval of a film under the Act, therefore, is obscenity." Sanza v. Maryland Board of Censors, 245 Md. 319, 338. In Dunn, however, the meaning of obscene as spelled in §6(b) was held to be so broad as to be fatally at variance with the rulings of the Supreme Court as to what the State constitutionally can ban from the public's viewing. Dunn made clear that the standard of obscenity is limited to

what can be deemed obscene in the constitutional sense. 240 Md. 252-254. At the time of Dunn, and thereafter until Miller, what was obscene in the constitutional sense was determined by the Roth test, and the Court of Appeals read the Roth definition of obscenity into the statute. Upon finding that decisions of the Supreme Court made it "manifest that only material which is obscene under the Roth test can be censored or suppressed by a state, and that a state may not effectively substitute its definition of what is obscene for the Roth definition,' the Court held 'that the right and power of the Board to ban films [and views] as "obscene' or as tending 'to debase or corrupt morals' under Sec. 6 of Art. 66A extend only to motion pictures [or views] which are obscene under the Roth test referred to and paraphrased in Trans-Lux [Distributing Corp. v. Board of Censors, 240 Md. 98] and in this opinion'. Dunn, at 254. The Court of Appeals consistently applied the Memoirs formulation of the Roth test as adopted by it. See Sanza v. Maryland Board of Censors, supra; Hewitt v. Maryland Board of Censors, 254 Md. 179; Wagonheim v. Maryland Board of Censors, 255 Md. 297; Hewitt v. Maryland Board of Censors, 256 Md. 358; Village Books v. State's Attorney, 263 Md. 76."

The Court of Special Appeals of Maryland thereafter incorporated the *Miller* obscenity definition into its Opinion. However, in the Opinion herein of the Court of Appeals of Maryland, the Court applied the *Roth-Memoirs* tri-partite test, 282 A.2d 126, 263 Md. 76. Upon reconsideration on the remand herein,the Court of Appeals of

Maryland, merely re-affirmed without opinion, (Appendix P. 21). Therefore, the law in the State of Maryland is unconstitutionally vague for this Court has pronounced in *Miller v. California, supra,* ___ U.S. ___, 93 S.Ct. 2607, at 2615, 37 L.Ed.2d 419, at 431,

> "The basic guidelines for the trier of fact must be: (a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest, Kois v. Wisconsin, *supra,* 408 U.S., at 230, 92 S.Ct., at 2246 (1972), quoting Roth v. United States, *supra,* 354 U.S., at 489, 77 S.Ct., at 1311 (1957), (b) whether the work depicts or describes, in a patently offensive way, ***sexual conduct specifically defined by the applicable state law,*** and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value. We do not adopt as a constitutional standard the '*utterly* without redeeming social value' test of Memoirs v. Massachusetts, *supra,* 383 U.S., at 419, 86 S.Ct., at 977, (1966); that concept has never commanded the adherence of more than three Justices at one time. See pp. 2613-2614, *supra.* If a state law that regulates obscene material is thus limited, as written or construed, the First Amendment values applicable to the States through the Fourteenth Amendment are adequately protected by the ultimate power of appellate courts to conduct an independent review of constitutional claims when necessary.

"We emphasize that it is not our function to propose regulatory schemes for the States. *That must await their concrete legislative efforts.* It is possible, however, to give a few plain examples of what a state statute could define for regulation under the second part (b) of the standard announced in this opinion, *supra:*

"(a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated.

"(b) Patently offensive representation or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals.

" . . .

"Under the holdings announced today, no one will be subject to prosecution for the sale or exposure of obscene materials unless these materials depict or describe patently offensive 'hard core' *sexual conduct specifically defined by the regulating state law, as written or construed.* We are satisfied that these specific prerequisites will provide fair notice to a dealer in such materials that his public and commercial activities may bring prosecution."

II. Petitioners argue that a Writ of Certiorari should issue to the Court of Appeals of Maryland to afford the protection of the First Amendment to the Constitution of the United States of America, to the five (5) books condemned by the Circuit Court for Prince George's County,

Maryland, using a mythical yardstick of what the standards for tolerance of depiction of sexual matters in erotic literature would be in Prince George's County, Maryland, without consideration for community acceptance in any other city, or county, in the state. The Court of Appeals of Maryland ignored this issue, although briefed and argued by Counsel for the Petitioners in the Court below. In no other jurisdiction has the community been established as a single county, as opposed to a statewide community standard. The late Justice Frankfurter, concurring in *Smith v. California,* 361 U.S. 147, wrote,

> ". . . Community standards or the psychological or physiological consequences of questioned literature can, as a matter of fact, hardly be established except through experts . . . there is no external measuring rod for obscenity. Neither, on the other hand, is its ascertainment a merely subjective reflection of the taste or moral outlook of any individual jurors or individual judges. Since the law through its functionaries is 'applying contemporary community standards' in determining what constitutes obscenity, Roth v. United States, 354 U.S. 476, it surely must be deemed rational, and therefore, relevant to the issue of obscenity, to allow light to be shed on what those contemporary community standards' are. Their interpretation ought not to depend solely on the necessarily limited, hit or miss, subjective view of what they are believed to be by the individual juror or judge."

Prior to this Court's decision in *Miller v. California,* ____ U.S. ____, 93 S.Ct. 2607, 37 L.Ed.2d 419, a statewide

standard of obscenity was adopted by the Supreme Court of Wisconsin in *McCaulley v. Tropic of Cancer,* 20 Wis.2d 134, 121 N.W.2d 545, which was a Declaratory Judgment proceeding involving the book "Tropic of Cancer". The Court there pointed out that the purpose of the Wisconsin statute left no distinction to be made between the standards of different communities within the State. The Court of Appeals of Maryland has not heretofore ruled upon this issue and our only elucidation can be derived from a concurring opinion by Judge Barnes in *Wagonheim v. Maryland State Board of Censors,* 255 Md. 297, at 323, wherein Judge Barnes urged the Court to adopt a statewide geographical community standard as opposed to a citywide or countywide standard. In *Miller v. California,* this Court was dealing with a statewide community standard which was established by the state statute, rather than by judicial interpretation. All the testimony elicited in the *Miller* case was based upon this statewide community standard.

The Court of Special Appeals of Maryland in its decision in *Ebert v. State Board of Censors,* ____ Md. App. ____ A.2d ____, in analyzing this Court's Opinions in *Miller v. California, supra,* and it's siblings, stated:

> "The Court also settled doubt about the 'contemporary community standards' to be applied, at least sufficiently for the States to adopt a rule. It concluded in Miller that 'neither the State's alleged failure to offer evidence of 'national standards,' nor the trial court's charge that the jury consider state community standards, were constitutional errors. Nothing in the

> First Amendment requires that a jury must consider hypothetical and unascertainable 'national standards' when attempting to determine whether certain materials are obscene as a matter of fact.' ___ U.S. at ___, 93 S.Ct. at 2619. In Kaplan, ___ U.S. ___, 93 S.Ct. at 2658, the Court affirmed that contemporary community standards of the State, as opposed to national standards, are constitutionally adequate to establish whether a work is obscene.

It is to be noted that the Attorney General of Virginia, in the case of *Alexander v. Virginia*, ___ U.S. ___, 93 S.Ct. 2803, 37 L.Ed.2d 993, filed a Motion for Reconsideration, requesting this Court to clarify its holding in *Miller v. California*, asserting an ambiguity as to the geographical limits of the "community" established for consideration of "community standards". The community therein concerned being the the city of Portsmouth, Virginia. This Court denied the aforesaid Motion for Reconsideration and the ambiguity in *Miller* remains. Petitioners suggest that this case would be a proper vehicle for this Court to clarify this most important First Amendment controversy. Thereupon, Petitioners urge this Court to grant a Writ of Certiorari herein to establish a statewide geographic area for consideration of the community standards to be applied in ascertaining obscenity.

III. Article 27, Annotated Code of Maryland, §417, §418 and §418(a), are unconstitutional being repugnant to the First and Fourteenth Amendments to the Constitution of the United States of America. The task

of restructuring the statute was presented to the Court of Appeals of Maryland upon remand herein and that Court, without any opinion to elucidate its actions, reaffirmed its prior holding herein.

The legislature of the State of Maryland are the people who pass, repeal and amend statutes, not the Courts. The legislature has been in session since June, 1973, and failed to amend the Annotated Code of Maryland. The Court of Appeals of Maryland, the highest tribunal in the State, had the opportunity to construe the statute, which contains no definition of the word "obscene", when it was presented with this case upon remand following this Court's decision in *Miller v. California, supra.* Petitioners argue that this statute, in its present posture, is unconstitutionally vague. There is ample precedent for this argument from other jurisdictions.

The Supreme Court of Indiana in the case of *Allan Stroud v. State,* No. 570-S-107, after having affirmed the Appellant's conviction on the charge of selling obscene literature, 273 N.E. 2d 842, upon remand from the United States Supreme Court, which granted Certiorari and vacated the conviction, remanding for further consideration in light of *Miller v. California,* and its companion cases, stated:

> "The main thrust of those opinions, so far as applicable to this case, is that the statute under which the appellant was convicted is unconstitutional for reason that it is too general in nature and does not set out specifically the sexual or obscene acts which, when depicted in any of the media named by the statute, constitute a violation of the statute.

"Pursuant to the order and direction of the United States Supreme Court we hold the statute involved in this case as unconstitutional on the grounds announced by that Court.

"Therefore, pursuant to the Order of the United States Supreme Court, the judgment and conviction of appellant-defendant is reversed and remanded to the trial court, and pursuant to the Order of the United States Supreme Court, the trial court is directed to discharge the defendant.
ALL JUSTICES CONCUR."

In a companion case, the Supreme Court of Indiana made the same ruling, see *Mahoney vs. Indiana*, No. 471-S-94 (these decisions appear in the Appendix at Pages A. 26-29). This theory of the law has been followed as well by the County Court of Polk County, Florida, in the case of *State vs. Hall and Morrison*, No. MM73-2922, Appendix Page 37A; and in the District for Linn County, Iowa, in the case of *State vs. Levin, et al.*, No's IMI-242, Appendix Page 41A; and in the Municipal Court of Cass County, North Dakota, in the case of *City of Fargo vs. Wolfe and Davidson*, Appendix Page 30A.

Thereupon Petitioners argue that this Court should declare Article 27, Annotated Code of Maryland, §417, §418 (a) to be unconstitutional and grant the Writ of Certiorari herein.

CONCLUSION

In summary, the five (5) books involved herein, "Sex Confidential"; "Masturbation and Youth"; "Auto Fellatio and Masturbation"; "Ted & Blair"; and "Allen and Jim"; are constitutionally protected by the First Amendment to the Constitution of the United States of America, and therefore, they are entitled to be declared not obscene.

The posture of the law in the State of Maryland is unconstitutionally vague since the Maryland legislature has never attempted to define "obscene" as specifically required by *Miller v. California, supra,* and the highest appellate Court of the State of Maryland has not judicially construed the Maryland Code to mean anything other than what the prevailing climate of judicial interpretation of obscenity may be, or, alternatively, to apply the *Roth-Memoirs* tripartite definition of obscenity. The latter test cannot include the standards set forth in *Miller v. California,* since this Court did not contend that its definition of obscenity in *Miller* was inherent in, or embodied the *Roth-Memoirs* definition, or in any other previous definition of obscenity, and therefore, the Maryland Statute may not be considered as defining the word obscene to mean "sexual conduct specifically defined by the applicable state law" as set forth in *Miller v. California, supra.* In addition thereto, procedurally the flaw in declaring the geographical area for consideration of community standards to be that limited area of Prince George's County, Maryland, should command the issuance of a Writ of Certiorari herein, and upon consideration of the patent unconstitutionality of the Maryland Code Provision, upon which the action in the lower Court was based, this Court should issue its Writ of Certiorari to the Court of Appeals of Maryland to afford to the Petitioners the equal protection of the Constitution of the United States of America.

Therefore, it is respectfully requested that this Petition for Writ of Certiorari be granted,

Respectfully submitted,

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APPENDIX

IN THE CIRCUIT COURT FOR
PRINCE GEORGE'S COUNTY, MARYLAND

ARTHUR A. MARSHALL, JR. Plaintiff	:	
vs.	:	Equity No. D-4937
VILLAGE BOOKS, INC., et al Defendant	:	

DOCKET ENTRIES

1971, January 11th:	(1) Petition for Injunctive Relief, and Exhibits, filed. (Exhibits filed with Court Room Clerk)
1971, January 11th:	(2) Order of Court, filed.
1971, January 27th:	(4) Answer of respondents, Village Books, Inc. & Gary Wahl to application for Injunctive Relief & Counterclaim for Injunction Restraining the Petitioner from Harassing the Respondents, filed.
1971, January 27th:	(5) Motion of Respondents, Village Books, Inc. & Gary Wahl to Dismiss Application for Injunctive Relief, filed.
1971, February 2nd:	(7) Amended Application for Injunctive Relief, filed in open Court Answer of Respondent filed January 27, 1971 to serve as answer to Amended Application for Injunctive Relief.

1971, February 2nd:	Hearing in open Court on Amended Application for Injunctive Relief Judge Powers; Gazdayka, Reporter
	Plaintiff's exhibits 1 thru 21 admitted and filed
	Defendant's exhibits 1 admitted and filed
	Application for Injunctive Relief Dismissed as to Respondents Womack and Pryba by agreement of counsel
	Hearing recessed at 4:25 p.m. to resume at 9:30 a.m. February 8, 1971.
1971. February 8th:	Hearing resumed at 9:40 a.m. Judge Powers; Gazdayka, Reporter
	Order to be submitted.
1971, February 8th:	(10) Injunction, filed.
1971, March 3rd:	(11) Order for Appeal to the Court of Appeals of Maryland, filed. (Certified copy sent to Judge Powers).

APPLICATION FOR INJUNCTIVE RELIEF

Comes now Arthur A. Marshall, Jr., State's Attorney for Prince George's County, and makes application to this Honorable Court pursuant to the provisions of Article 27, Section 418A of the Annotated Code of Maryland, 1957 Edition as Amended, and Rule BB72 of the Maryland Rules of Procedure for an Ex Parte Injunction commanding the Respondents, Village Books, Inc., Dennis Pryba, H. Lynn Womack, and Gary Wahl, to refrain from selling, distributing and possessing with intent to distribute magazines, books, stories, pictures, photographs and motion pictures which are obscene within the meaning of Article 27, Section 418 of the Annotated Code of Maryland, 1957 Edition as Amended, and for reasons therefore states as follows:

1. That on January 4, 1971, your applicant was contacted by telephone by Stanley Dietz, Esquire, who stated that he represented a group of people who were going to open a bookstore in Prince George's County which was going to sell pornographic books and magazines.

2. That on January 5, 1971, your applicant was contacted in person by Stanley Dietz who again advised that his clients intended to open a pornographic bookstore in Prince George's County to be located at the shopping center at Andrews Manor.

3. That on January 6, 1971, Mr. Dietz furnished your applicant with samples of the items which his clients intend to sell at the bookstore known as "Village Books, Inc." located at 4807 Allentown Road, Camp Springs, Maryland. Those items being books and magazines characterized by Mr. Dietz as being pornographic. Those items are incorporated into this application as Exhibit No. 1.

4. Your applicant has reviewed each of the items contained within Exhibit No. 1 and has concluded that these magazines and books are obscene within the definitions contained within Article 27, Section 417 et seq. Your applicant advised Mr. Dietz on January 7, 1971, that much of

the material was obscene not only under Maryland Court of Appeals decisions but additionally under Federal decisions and particularly in light of a recent Prince George's County decision concerning obscene matter. Your applicant further advised Mr. Dietz that his clients would be prosecuted should they attempt to sell such obscene publications. Mr. Dietz's response to this was that he would "See you in court."

WHEREFORE, the premises considered, your applicant prays that this Court issue a temporary constraining order directed at Village Books, Inc., Dennis Pryba, H. Lynn Womack and Gary Wahl commanding them to cease, desist in violating Article 27, Section 418 of the Annotated Code of Maryland, 1957 Edition as Amended, and in addition your petitioner requests that this matter be set down for hearing before this Court as prescribed by law.

/s/ Arthur A. Marshall, Jr.
Arthur A. Marshall, Jr.
State's Attorney

Personally appeared before me, a Judge of the Circuit Court for Prince George's County, this *11th* day of January, 1971, Arthur A. Marshall, Jr., who made oath in due form of law that the facts contained in the above paragraphs are true to the best of his knowledge and belief.

/s/ James H. Taylor
Judge

ORDER

Upon consideration of the Application for Injunctive Relief filed by Arthur A. Marshall, Jr., it is this *11th* day of January, 1971, by the Circuit Court for Prince George's County,

ORDERED, that Village Books, Inc., Dennis Pryba, H. Lynn Womack, and Gary Wahl, cease and desist from violating Article 27, Section 418 of the Annotated Code of

Maryland, 1957 Edition, as Amended, with respect to their sale of magazines, books, stories, pictures, photographs and motion pictures which are obscene, and it is further

ORDERED, that a copy of this Order be herewith served on Dennis Pryba and/or H. Lynn Womack and/or Gary Wahl, agents for Village Books, Inc. located at 4807 Allentown Road, Camp Springs, Maryland, and it is further

ORDERED, that this matter be set down for hearing as prescribed by Article 27, Section 418A2 of the Annotated Code of Maryland, as amended.

/s/ James H. Taylor
Judge

TRUE COPY–TEST:–
W. WAVERLY WEBB, CLERK–

By /s/ B. Chaney
B. Chaney, Deputy Clerk

ANSWER OF RESPONDENTS, VILLAGE BOOKS, INC. AND GARY WAHL TO APPLICATION FOR INJUNCTIVE RELIEF AND COUNTERCLAIM FOR INJUNCTION RESTRAINING THE PETITIONER FROM HARASSING THE RESPONDENTS.

Now comes the Respondents, Gary Wahl and Village Books, Inc., by their Attorney, Stanley M. Dietz, answering the Application for Injunctive Relief herein as follows:

1. Respondents, Gary Wahl and Village Books, Inc. deny that co-respondents, Dennis Pryba and H. Lynn Womack are Officers or Directors of Village Books, Inc.

2. Respondents admit that on or about January 4, 1971, the Petitioner, Arthur A. Marshall, Jr., was contacted by Stanley M. Dietz, Esquire, the Attorney for the Respondents, to inform the Petitioner of the intention of the Respondent, Village Books, Inc. to open an adult bookstore

at the Andrews Manor Shopping Center, in Prince George's County, Maryland. Respondents deny the remaining allegations contained in Paragraph 1 of the Application for Injunctive Relief alleging to the Court that if at any time any comments were made by counsel for the Respondents to the effect that "Pornographic Books and Magazines" were to be disseminated by the Respondents then said comments were made in jest and intended as a joke and taken as a joke by the Petitioner.

3. Respondents admit that on January 5, 1971, Petitioner, Arthur A. Marshall, Jr., was personally contacted by Stanley M. Dietz, Esquire, the Attorney for Village Books, Inc., who at that time discussed the law of pornography with the Petitioner, in an attempt to determine what literary materials would be challenged by the Petitioner, who stated, "You know the law, it has got to be hard core pornography otherwise it's okay with me". Respondents deny the remaining allegations contained in Paragraph 2 of the Application for Injunctive Relief alleging to the Court that the only references made by Stanley M. Dietz to the Petitioner, or to any other members of the State's Attorney Office for Prince George's County, Maryland, regarding "a pornographic bookstore" were statements made in jest, intended as a joke and received as a joke.

4. Respondents admit that on January 6, 1971, their Attorney, Stanley M. Dietz, furnished the Petitioner with a cardboard carton containing samples of books and magazines which the Respondent intended to sell at its adult bookstore in the Andrews Manor Shopping Center. Respondents deny the remaining allegations of Paragraph 3 of the Application for Injunctive Relief alleging that when the carton of exhibits were delivered to the State's Attorney's Office it was accompanied by copies of various opinions of both Federal and State Courts which had held the books and magazines contained in the carton to be not obscene and constitutionally protected.

5. Respondents admit the allegations contained in Paragraph 4 of the Application for Injunctive Relief, alleging to the Court that the magazines intended to be sold by the Respondent at Andrews Manor Shopping Center adult bookstore are constitutionally protected and not obscene.

6. Respondents allege that this Application for Injunctive Relief was politically motivated as part of the campaign of the Petitioner, running for election to the office of County Manager, the Petitioner having agreed on January 14, 1971 with the statement of Stanley M. Dietz, the Attorney for the Respondent, Village Books, Inc., that this suit was worth 5,000 votes to the Petitioner in his campaign.

7. Respondents allege that the Petitioner and his Chief Deputy, Vincent Femia, Esquire, have stated that they will close any adult bookstore opened in Prince George's County and have threatened to cause the arrest of all employees of the Village Bookstore upon charges of possession and sales of obscene literature, if the Village Bookstore opens its doors to the public in the Andrews Manor Shopping Center. These threats have caused the Village Bookstore to be reluctant to commence its business thereby violating the rights of the Respondent, Village Books, Inc. protected by the First Amendment to the Constitution of the United States of America and Article Ten of the Declaration of Rights of the State of Maryland, constituting an unlawful prior restraint upon the exercise of free speech of the Respondent, Village Books, Inc., and of the adult citizens of Prince George's County, State of Maryland, who would be the patrons of Respondent's adult bookstore. All of which has caused irreparable injury and damage to the Respondents and will in the future cause irreparable injury and damage to the Respondents by infringing upon the Respondent's constitutional rights protected under the First Amendment to the Constitution of the United States of America and Article Ten of the Declaration of Rights of the State of Maryland.

To the end therefore, Respondents pray the Court as follows:

1. To deny the Petitioner's prayers for injunctive relief.

2. To enjoin the Petitioner, his deputies, agents, servants, employees and assistants from harassing, disturbing, and coercing the Respondents and from interfering with the Respondents' rights protected by the First Amendment to the Constitution of the United States of America and Article Ten of the Declaration of the Rights of the State of Maryland by threatening to cause the arrest or causing the arrest of the Officers and employees of Village Books, Inc.

Stanley M. Dietz
Attorney for Respondents

District of Columbia, SS:

Gary Wahl, upon his oath, being first duly sworn according to law, deposes and says that he is President of Village Books, Inc., that he makes this Affidavit upon behalf of said corporation and in his official capacity, and individually as a respondent herein, that he has read the foregoing Answer to Application for Injunctive Relief and Counterclaim for Injunction, and that the matters and facts therein contained are true to the best of his knowledge, information and belief.

Gary Wahl

Subscribed and sworn to before me, this ____ day of January, 1971.

_____
Notary Public

Respondents demand an immediate hearing by jury trial on all of the issues herein.

Stanley M. Dietz
Attorney for Respondents
Village Books, Inc. and Gary Wahl

MOTION OF RESPONDENTS, VILLAGE BOOKS, INC. AND GARY WAHL TO DISMISS APPLICATION FOR INJUNCTIVE RELIEF

Now comes the Respondents, Gary Wahl and Village Books, Inc., by their Attorney, Stanley M. Dietz, and move the Court to dismiss the Application for Injunctive Relief filed herein pursuant to Article 27, Section 418A of the Annotated Code of Maryland, upon the ground that said Section is repugnant to the First Amendment to the Constitution of the United States of America and to Article Ten of the Declaration of Rights of the State of Maryland in that said Code Section provides for a prior restraint of indefinite term during the pendency of the Show Cause Injunction restraining the dissemination of presumptively protected literary material and further that said Code provision does not provide for a trial by jury on the issue of obscenity, see *Kingsley Books, Inc. v. Brown*, 354 U.S. 436 at 446 and 447, dissenting opinions.

Stanley M. Dietz
Attorney for Respondents
Village Books, Inc. and Gary Wahl

Respondents demand an immediate hearing.

Stanley M. Dietz
Attorney for Respondents
Village Books, Inc. and Gary Wahl

INJUNCTION

After consideration of the evidence and arguments presented in open court and the exhibits accepted into evidence in the above captioned case and pursuant to the oral opinion of this Court, it is hereby,

ORDERED, on this *8th* day of February, 1971, that Village Books, Inc. and Gary Wahl are enjoined from any sale, distribution, or possession with intent to sell or distribute the following magazines:

1. Fun and Games, Volume 2 No. 1
2. New Directions No. 16
3. Nude Lark No. 29
4. One plus One Volume 2 No. 1
5. Yum Yum No. 2
6. Love Date Volume 1 No. 1
7. Yum Yum
8. Sex Confidential Exhibit #8
9. Naked Love Number Seven
10. Eclipse Vol. 1, No. 3
11. Eclipse Vol. 1, No. 4
12. Masturbation and Youth
13. Auto-Fellation & Masturbation
14. The Boy Lovers
15. Ted & Blair
16. Nudist Youth No. 9
17. Allen & Jim
18. Teen Nude

ORDERED, that Village Book, Inc. and Gary Wahl surrender all the above enumerated enjoined magazines to Det. Rodney Brewer pursuant to Article 27, Section 418A(3) (*Md. Code Ann.* 1971 Replacement Ed.) and the said Det. Rodney Brewer is directed to seize and destroy the same.

/s/ Powers
Judge

ORDER OF APPEAL

Respondents, Village Books, Inc., and Gary Wahl, hereby appeal the Court's Order herein issued February 8, 1971 to the Court of Appeals of Maryland.

Stanley M. Dietz
Attorney for Respondents
Village Books, Inc. and Gary Wahl

Upper Marlboro, Maryland
Tuesday, Feb. 2, 1971

[2] PROCEEDINGS

THE DEPUTY CLERK: Equity D-4937, Arthur A. Marshall, Jr., State's Attorney, v. Village Books, Inc., et al.

THE COURT: Gentlemen, there were several different matters that were discussed preliminarily in chambers that we probably should go on the record so that they could be disposed of at this time.

First, a question was raised as to the form of the original application for injunctive relief. In view of the fact that it dealt in general and only referred by reference to a box of material, and although this wasn't squarely met in the pleadings, it was my conclusion that a general injunction, even if justified, would be fraught with complications and problems and it would be more desirable to proceed on the basis of specific material.

As a result of that the State has filed an amended application for injunctive relief setting forth twenty-one specific exhibits which have been numbered and referred to in the application.

It is my understanding, Mr. Dietz, that you have a copy of this and there is no objection to filing this and you are ready to proceed on the application as amended?

MR. DIETZ: Your Honor, I have a copy. I am ready. I have no objection to the amendment, and I am ready to proceed on the application, as amended. I request the Court to [3] consider my answer filed as to the original application to also answer this amended application.

THE COURT: Very well. There is no objection to that, Mr. Amster?

MR. AMSTER: No, your Honor.

THE COURT: Then there was a question concerning the parties. Mr. Dietz, you have moved to dismiss the application for injunctive relief as to the respondents, H. Lynn Womack and Dennis Pryba?

MR. DIETZ: That is correct.

THE COURT: There is no objection?

MR. AMSTER: No objection.

THE COURT: That motion will be granted and we will proceed with the case. The respondents in the present posture are Village Books, Inc. and Gary–

MR. DIETZ: Gary Wahl, who is the president of Village Books.

THE COURT: Very well.

MR. AMSTER: Your Honor, in the posture of the case as it was this morning, as to these exhibits the State has separated from the box such books that Mr. Dietz brought to the State's Attorney's office. We separated these. We would offer these into evidence, and I believe there is no objection.

MR. DIETZ: There is no objection to the exhibits being entered in evidence, your Honor, being the same ones [4] that are named in the amended application for injunctive relief.

THE COURT: Very well. They are already marked seriatim 1 through 21. They will be received by the clerk and received in evidence.

(The 21 magazines referred to, marked Plaintiff's Exhibits Nos. 1 through 21 for identification, were received in evidence.)

THE COURT: Is there any testimony or any other evidence?

MR. AMSTER: The State, your Honor, will make only an opening statement on the law we are proceeding on. We will present no testimony as far as witnesses are concerned.

THE COURT: Normally the argument on the law is after both sides have rested as far as any testimony.

MR. AMSTER: The procedure, your Honor, as I understand from reading the cases dealing with, what we call, hard-core pornography or obscenity, per se, as I understand it the State made application of opening statement after the exhibits are accepted into evidence and rests at that point, at which point the defendant has his turn to either present evidence or not. We are proceeding in that light.

THE COURT: Very well.

* * * * *

[7] MR. DIETZ: Your Honor, if at this point the State rests, upon the admission in evidence of these twenty-one books, which I do not feel that any one of them constitutes hard-core pornography, I feel that the State, at this point, [8] has failed in their burden of proof. I realize this is an equity case, but I can give your Honor a line of decisions that hold in cases like this, where it is questionable as to whether or not it is hard-core pornography, then you must receive and accept testimony relating to the different elements of the definition of pornography.

* * * * *

[9] THE COURT: You have the right to file a motion to dismiss. The only difficulty is without getting the entire case and all of the evidence I am not, at the present time, prepared to say that there is no exhibit that has been filed that is not hard-core pornography, as expressed in the judicial language, cries out and is of such character that it is not necessary to have testimony as to the community standards and whether there is any redeeming social value.

Under those circumstances, taking what you said as a motion to dismiss at this point, I will deny your motion. [10] So we will go on with the defense of the case and then make the final determination at the conclusion of the entire case.

MR. DIETZ: Your Honor is denying it without prejudice at renewing it at the close of all the testimony?

THE COURT: I am denying it.

* * * * *

* * * * *

Upper Marlboro, Maryland
Monday, Feb. 8, 1971

[79] PROCEEDINGS

THE DEPUTY CLERK: Equity D-4937, Marshall v. Village Books, et al.

THE COURT: Are you ready to proceed, gentlemen?

MR. DIETZ: I am ready to proceed.

MR. AMSTER: The State is ready, your Honor.

THE COURT: The State's Attorney brought an action against the defendants, Village Books, Inc. and Gary Wahl, under Article 27, Section 418A, which provides that the State's Attorney may seek injunctive relief against any person, firm or corporation who sells or is about to sell obscene material.

An amendment to the pleadings resulted in the State's filing twenty-one exhibits, each publication alleged to be obscene, under the statute, and not protected by the First Amendment to the Constitution. The State rested after the introduction of these exhibits, since it was stipulated that they were included in the material which the defendants would be selling at their "adult" book store in Prince George's County, Maryland.

The defendants called two witnesses, one of whom was a psychiatrist who testified that he did not believe any of the material was "necessarily an appeal to the prurient interest," and a man who was in the business of distributing this kind of material who went through the list of twenty-one exhibits and gave the number of copies that were originally [80] printed, which ranged from five thousand up to more than twenty thousand, presumably to indicate the material had a rather wide distribution throughout the country.

Both sides rested with the hearing in that posture, so it becomes the duty of the Court, as I see it, to make a determination of whether any of the exhibits are "hard-core" pornography.

The twenty-one exhibits vary in character and nature, but by way of generalization the first eleven involve photographs, color and black and white, of nude males and females with genitals fully exposed. In many of the pictures there was considerable accent on the genitals, and the individuals in the photographs, by their postures, positions, arrangements and expressions, were suggesting various kinds of sexual acts, conventional and unconventional. So that my conclusion is that they were sufficiently suggestive so that if the consummated act itself were depicted in the picture it would add nothing to the appeal to the prurient interest. In other words, the suggestion was so strong that carrying it out would be anticlimatic. That applied to the eleven exhibits, Nos. 1 through 11, which involved males and females.

The photographs in Exhibit No. 12 depicted males only in various acts of masturbation.

Exhibits Nos. 13, 14 and 15 were photographs only of individual males with obvious accent on the genitals, but [81] without involving any sex act or suggestion of a sex act and only showed one person in each picture. As to these, I would say, there was some question as to the appeal to the prurient interest in sex.

The subject of Exhibit No. 16 was "Auto-Fellatio and Masturbation," which I think not only suggested but depicted a consummated sexual act.

Exhibits Nos. 17, 18, 19, 20 and 21 each involved an obvious appeal to male homosexuals, and the photographs there would fall into precisely the same category as the first eleven, if you would simply substitute a female for a male.

There were more than one male in many of the pictures and their gestures and positions and expressions strongly suggested a homosexual act.

The law on the question of obscenity has developed considerably in recent years. Up to the time of the Roth case, Roth v. U.S., 354 U.S. 476, it appeared that what a State wanted to call obscenity was up to the State and protection under the First Amendment did not often come into play.

As a result of Roth, and some related cases, the term "obscene" as used in statutes in the various States lost its normal dictionary meaning and was given its own more limited definition by the Supreme Court. It was said that in order to be obscenity, which would not be protected by the First Amendment, it was necessary that three elements coalesce, and the [82] three elements were: One, the dominant theme of the material taken as a whole appeals to the prurient interest in sex; and there was a subdivision of that, (a) if the material was designed and disseminated to a deviant sexual group, then the material would appeal to the prurient interest of that deviant group. Two, the material must be patently offensive because it affronts the contemporary community standards relating to description and representation of sexual matters. Three, the material must be utterly without redeeming social value.

Since those cases were decided the law, insofar as the Supreme Court of the United States is concerned, has become considerably confused, because of the Redrup case, Redrup v. State of New York, 386 U.S. 676, and the other cases that followed. In Redrup and numerous cases thereafter the Supreme Court granted certiorari and reversed criminal convictions in state courts without stating in the opinions sufficient information to be any guide to state trial judges in determining obscenity cases.

However, the state of the law in Maryland is clearer for the reason that there have been several obscenity cases determined by our Court of Special Appeals after Roth and then after Redrup, and after the more recent cases that followed Redrup. So there is that much of a guide, even though a judge attempting to guess how the Supreme Court would decide a given case now would be in the position of embarking on an [83] unchartered course, partially blindfolded and without a known destination.

However, without getting into the maze created by the Federal decisions, I believe that this case can be decided with the guidance of the Maryland cases.

In Donnenberg v. State, 1 Md. App. 591, the Court of Special Appeals stated the principle that neither the judge, in trying a case in the lower court, nor the appellate judge would be qualified to determine whether material meets the Roth test, that is, that the three elements must coalesce without independent testimony. In other words, whether or not a given piece of material would have redeeming social value because of its being artistic or because of its having some scientific or literary value, would require expert testimony from people who possessed more expertise in that field than judges or jurors who would be trying such a case.

The Court in Donnenberg, at Page 600, said there was an exception with respect to material that is hard-core pornography:

> "We noted in Levin v. State that hard-core pornography has been said to be material which 'focuses predominately upon what is sexually morbid, grossly perverse, and bizarre without any artistic merit or scientific purpose or justification.' There is no desire to portray the material in [84] pseudo-scientific or 'arty' terms. It can be recognized by the insult it offers, invariably, to sex and to the human spirit. It goes substantially beyond customary limits of

> candor and deviates from society's standards of decency in the representation of the matters in which it deals. It has a patent absence of any redeeming social value; it speaks for itself and screams for all to hear that it is obscene. It is not designed to be a truthful description of the basic realities of life as the individual experiences them but its main purpose is to stimulate erotic response."

So that on the question of expert testimony I conclude that no such testimony is necessary in considering Exhibits Nos. 1 through 12, and Exhibit No. 16. Exhibits Nos. 17 through 21 all appeal to the prurient interest of a homosexual male and expert testimony is not necessary to reach that conclusion.

So in considering all of the exhibits, except for Nos. 13, 14 and 15, I conclude that the impression of obscenity is so strong that expert testimony to support this is unnecessary, and that if there were expert testimony to the contrary it simply could not be given enough weight to overcome the strong impression that it was obscene.

In assaying the case to determine the presence of [85] the three elements that must coalesce, I hold that the dominant theme of these exhibits, each individual exhibit as a whole, appeals to a prurient interest in sex, Nos. 1 through 11 generally because they involve males and females, and the remaining exhibits, Nos. 12 through 21, with the exception of Nos. 13, 14 and 15, to a clearly defined deviant sexual group, namely, male homosexuals.

As to the second element which requires a finding that the material is patently offensive because it affronts the contemporary community standards relating to description and representation of sexual matters, I find that all twenty-one exhibits, with the same exception of Nos. 13, 14 and 15, are patently offensive and that they affront the contemporary community standards.

In view of the fact that the Supreme Court has never defined what community is involved in defining "community standards" I suppose it would be desirable for this Court to make some determination. When I speak of "community" I mean the same community from which jurors are drawn to decide any factual issues involved in any cases in this court. Therefore, I am speaking of Prince George's County, which is the same area from which jurors are drawn to sit in cases in this County. And I conclude and find that this material is patently offensive because it affronts contemporary standards in Prince George's County relating to the description and representation of sexual [86] matters.

As to the third element, the material is utterly without redeeming social value. In some of the exhibits there was some printed material other than photographs. In none was I able to find that this had any redeeming social value whatever and, in fact, considering the advertisements that were in the magazines and the printed material I think that it had an exacerbating effect on an appeal to the prurient interest rather than any redeeming effect, neither was it artistically, scientifically, nor literarily of any redeeming value whatever.

So, having reached these conclusions I come to the application for an injunction. The Court will pass a decree, when presented, enjoining the defendants from the sale of the material involved in the twenty-one exhibits, with the exception of Exhibits Nos. 13, 14, and 15. Even as to those it was fairly close, but I concluded that the defendant would be given the benefit of the doubt, and it may be that some witness from a scientific standpoint would be able to testify that this had some redeeming social value. I could possibly be convinced by such testimony that it did have such value and therefore hold in favor of the defendant. In the others I cannot say that. If there were witnesses testifying that it had some redeeming social value I simply would not be able to

give that testimony sufficient weight to make the determination in that direction.

Therefore, Mr. Amster, if you will present an order [87] consistent with this opinion, enjoining the defendant from the sale, as stated, it will be signed.

(Whereupon, at 10:05 o'clock a.m., the hearing in the above-entitled matter was concluded.)

VILLAGE BOOKS, INC., *et al.*	)	
	)	In The
	)	Court of Appeals
v.	)	of Maryland
	)	
STATE'S ATTORNEY FOR	)	No. 37
PRINCE GEORGE'S COUNTY	)	September Term, 1971
	)	

ORDER

Pursuant to the mandate of the Supreme Court of the United States issued on July 25, 1973 vacating the judgment in the above entitled case and remanding to the Court of Appeals of Maryland for further consideration in the light of *Miller v. California,* ____ U.S. ____ (1973); *Paris Adult Theatre I v. Slaton,* ____ U.S. ____ (1973); *Kaplan v. California* ____ U.S. ____ (1973); *U.S. v. 12 200-ft Reels of Super 8mm Film,* ____ U.S. ____ (1973); *U.S. v. Orito,* ____ U.S. ____ (1973); *Heller v. N.Y.,* ____ U.S. ____ (1973); *Roaden v. Ky.,* ____ U.S. ____ (1973); and *Alexander v. Virginia,* ____ U.S. ____ (1973), this Court has reconsider its opinion and judgment in light of the cases set forth above and finds that the opinion and jugement should be reaffirmed; therefore, it is this 10th day of October, 1973

ORDERED by the Court of Appeals of Maryland that the judgment of this Court entered on October 13, 1971 modifying the order of the lower court and as modified affirming, with costs to be paid by appellants; be, and it is hereby, reinstated and reaffirmed.

/s/ Robert C. Murphy
Chief Judge

AMENDMENTS TO THE CONSTITUTION

[Amendment I]

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and petition the Government for a redress of grievances.

* * * * *

[Amendment XIV]

Section 1.

All persons born or naturalized in the United States and subject to the Jurisdiction thereof, are citizens of the United States and of the States wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * * * *

§ 417. Definitions.

As used in this subtitle,

(1) *"Matter"* means any book, magazine, newspaper, or other printed or written material or any picture, drawing, photograph, motion picture, or other pictorial representation or any statue or other figure, or any recording, transcription or mechanical, chemical, or electrical reproduction or any other articles, equipment, machines or material.

(2) *"Person"* means any individual, partnership, firm, association, corporation, or other legal entity, but shall not be construed to include an employee of any individual, partnership, firm, association, corporation, or other legal entity operating a theatre which shows motion pictures if the employee is not an officer thereof or has no financial interest therein other than receiving salary and wages.

(3) *"Distribute"* means to transfer possession of, whether with or without consideration.

(4) *"Knowingly"* means having knowledge of the character and content of the subject matter. (1967, ch. 394, § 1; 1968, ch. 619.)

§ 418. Sending or bringing into State for sale or distribution; publishing, etc., within State.

Every person who knowingly sends or causes to be sent, or brings or causes to be brought, into this State for Sale or distribution, or in this State prepares, publishes, prints, exhibits, distributes, or offers to distribute, or has in his possession with intent to distribute or to exhibit or offer to distribute, any obscene material is guilty of a misdemeanor. (1976, ch. 394, § 1.)

ART. 27, § 41A

* * * * *

§ 418A. Injunctive remedy.

The circuit courts of the counties and the equity courts of the Supreme Bench of Baltimore City have jurisdiction to enjoin the sale or distribution of any book, magazine, or any other publication or article (including a motion picture film or showing) which is prohibited from sale or distribution, as hereinafter specified.

1. The State's attorneys of the counties and Baltimore City in which a person, firm or corporation sells or distributes or is about to sells or distribute or has in his possession with intent to sell or distribute or is about to acquire possession with intent to sell or distribute any book, magazine, pamphlet, newspaper, story paper, writing paper, picture, card, drawing or photograph (including a motion picture film or showing) or any article or instrument of use which is obscene, within the meaning of § 418 of this article may maintain an action for an injunction against such person, firm or corporation in the circuit courts of the counties or the equity courts of the Supreme Bench of Baltimore City to prevent the sale or further sale or the distribution or further distribution or the acquisition, publication or possession within this State or any book, magazine, pamphlet, newspaper, story paper, writing paper, picture, card, drawing or photograph (including a motion picture film or showing), or any article or instrument of use which is obscene.

2. The person, firm, or corporation sought to be enjoined is entitled to a trial of the issues within one day after joinder of issue and a decision shall be rendered by the court within two days after the conclusion of the trial.

3. In the event that an order or judgment be entered in favor of the State's attorney and against the person, firm or corporation sought to be enjoined, such final order or judgment shall contain a provision directing the person, firm or corporation to surrender to such peace officer as the court may direct or to the sheriff of the county in which the action was brought any of the matter described in this section and such sheriff or officer shall be directed to seize and destroy the same.

4. In any action brought pursuant to the provisions of this section, the State's attorney is not required to file any bond before the issuance of an injunction order provided for by this section, is not liable for costs and is not liable for damages sustained by reason of the injunction order in cases where judgment is rendered in favor of the person, firm or corporation sought to be enjoined.

5. Every person, firm or corporation who sells, distributes or acquires possession with intent to sell or distribute any of the matter described in this section, after the services upon him of a summons and complaint in an action brought by the State's attorney of the county or Baltimore City pursuant to this section is chargeable with knowledge of the contents thereof. (1961, ch. 382; 1968, ch. 619.)

* * * * *

IN THE
SUPREME COURT OF INDIANA

HARRY MOHNEY, *Appellant,*	)	
	)	No. 471 S 94
v.	)	
STATE OF INDIANA, *Appellee.*	)	

APPEAL FROM MARION CRIMINAL COURT, DIVISION 2
The Honorable Saul I. Rabb, Judge

ARTEBURN, C. J.

This Court affirmed [Mohney v. State (1971), ___ Ind. ___, 276 N.E.2d 517] the conviction in the above case on a charge of "sending obscene literature into state" based upon IC 1971, 35-30-10-3 [Burns' Ind. State. Ann. § 10-2803 a (1956 Repl.)], entitled "Obscene literature and devices – Circulation, possession, manufacture.", and thereafter the appellant-defendant applied for certiorari in the United States Supreme Court and that Court on the 25 day of June, 1973, having granted certiorari, vacated our judgment affirming the conviction and remanded the cause to this court "for further consideration in light of *Miller v. California,* ___ U.S. ___ (1973); *Paris Adult Theatre I v. Slaton,* ___ U.S. ___ (1973); *Kaplan v. California,* ___U.S. ___ (1973); *U.S. v. 12 200-ft. Reels of Super 8mm Film,* ___ U.S. ___ (1973); *U.S. v. Orito,* ___ U.S. ___ (1973); *Heller v. N.Y.* ___ U.S. ___ (1973); *Roaden v. Ky,* ___ U.S. ___ (1973); and *Alexander v. Virginia,* ___ U.S. ___ (1973)."

The main thrust of those opinions, so far as applicable to this case, is that the statute under which the appellant was convicted is unconstitutional for the reason that it is too general in nature and does not set out specifically the sexual or obscene acts which, when depicted in any of the media named by the statute, constitute a violation of the statute.

Pursuant to the order and direction of the United States Supreme Court we hold the statute involved in this case as unconstitutional on the grounds announced by that Court.

Therefore, pursuant to the Order of the United States Supreme Court, the judgment and conviction of appellant-defendant is reversed and remanded to the trial court, and pursuant to the order of the United States Supreme Court, the trial court is directed to discharge the defendant.

ALL JUSTICES CONCUR.

IN THE
SUPREME COURT OF INDIANA

ALLAN STROUD, *Appellant,*	)	
v.	)	No. 570 S 107
STATE OF INDIANA, *Appellee.*	)	

APPEAL FROM MARION CRIMINAL COURT, DIVISION 2
The Honorable Saul I. Rabb, Judge

ARTEBURN, C.J.

This Court affirmed [Stroud v. State (1971), ___ Ind. ___, 273 N.E.2d 842] the conviction in the above case on a charge of "sale of obscene literature" based upon IC 1971, 35-30-10-1 [Burns' Ind. Stat. Ann. § 10-2803 (1956 Repl.)] entitled "Obscene literature and devices – Circulation, possession, manufacture.", and thereafter the appellant-defendant applied for certiorari in the United States Supreme Court and that Court on the 25th day of June, 1973, having granted certiorari, vacated our judgment affirming the conviction and remanded the cause to this court "for further consideration in light of *Miller v. California,* ___ U.S. ___ (1973); *Paris Adult Theatre I v. Slaton,* ___ U.S. ___ (1973), *Kaplan v. California,* ___ U.S. ___ (1973); *U.S. v. 12 200-ft Reels of Super 8mm Film,* ___ U.S. ___ (1973); *U.S. v. Orito,* ___ U.S. ___ (1973); *Heller v. N.Y.,* ___ U.S. ___ (1973); *Roaden v. Ky.,* ___ U.S. ___ (1973); and *Alexander v. Virginia,* ___ U.S. ___ (1973)."

The main thrust of those opinions, so far as applicable to this case, is that the statute under which the appellant was convicted is unconstitutional for the reason that it is too general in nature and does not set out specifically the sexual or obscene acts which, when depicted in any of the media named by the statute, constitute a violation of the statute.

Pursuant to the order and direction of the United States Supreme Court we hold the statute involved in this case as unconstitutional on the grounds announced by that Court.

Therefore, pursuant to the Order of the United States Supreme Court, the judgment and conviction of appellant-defendant is reversed and remanded to the trial court, and pursuant to the order of the United States Supreme Court, the trial court is directed to discharge the defendant.

ALL JUSTICES CONCUR.

STATE OF NORTH DAKOTA In Municipal Court
COUNTY OF CASS Before Thomas A. Davies, Municipal Judge

-000-

CITY OF FARGO, *Plaintiff*	)	
v.	)	MEMORANDUM ORDER
JAMES D. WOLFE and NORMAN W. DAVIDSON *Defendants*	)	

-000-

This Court has pending before it two motions filed by the Defendants, James D. Wolfe and Norman W. Davidson:

1. Motion for Order facating search warrants and directing return of property seized dated March 26, 1973, and subsequently taken under advisement of the Court.

2. Motion to quash subsequently entitled motion to dismiss the action upon the grounds that Section 10-0303 of the Revised Ordinances of the City of Fargo, 1965 is unconstitutional, such motion dated July 30, 1973.

I shall direct myself to the motions made in the order in which they were filed. The motion for order vacating search warrants and directing return of property seized, dated March 26, 1973 is moot, since the City of Fargo

and the individual Defendants entered into a written stipulation in United States District Court for the District of North Dakota, Southeastern Division, Civil No. 4820, wherein all material matters raised in the Defendants' motion were resolved by stipulation which resulted in a motion by the City of Fargo for release of specified evidence. The motion was presented to this Court and such motion was granted.

Irrespective of the action taken in Federal Court, the decisional law on adversary hearings, as cited by the Defendants, would have compelled this Court in these specific cases to have issued an Order directing return of any duplicate property seized.

Other than orally opposing Defendants' motion, the City made no effort in this Court to respond to the documented brief of the individual Defendants.

This Court now squarely faces the question of the constitutionality of Section 10-0303 of the Fargo Revised Ordinances of 1965, which ordinance reads:

> "10-0303. *Buying, selling, and designing obscene literature prohibited.* No person shall (1) buy, sell, distribute or cause to be distributed, or (2) cause to be sold, advertise, lend, give away, offer, show, exhibit, have in his possession with the intent to sell, lend, give away, offer, show, exhibit, distribute or cause to be distributed, or (3) design, copy, draw, photograph, print, etch, engrave, cut, carve, make, publish, or otherwise prepare or assist in preparing, or (4) receive subscriptions for any indecent or obscene book, pamphlet, paper, picture, print, drawing, figure,

> image or any engraved, printed or written matter, or any article or instrument of or for immoral use. No person shall hire, use, or employ any minor to sell, or give away, or in any manner distribute or permit any minor in his custody or control to give away or distribute in any manner any indecent article or thing."

In its response to the defense motion to dismiss, the City of Fargo, on page 3 of its Return to Motion says:

> "Before this Court hastily opens the doors of Fargo to a flood of pornography, it should first determine whether it can apply *Miller's** simple guidelines to determine whether the evidence before it is obscene or indecent."

This Court rejects the City's commentary and position. The question is whether the ordinance is itself constitutional and hence, lawful. If it is, the Court can then proceed to trial and consider the evidence.

To close the door in the face of an influx of pornographic or obscene materials is a goal all men of moral conviction should strive for, but this goal cannot be attained without the proper tools. To use the City's terminology, the "door" is the *law*, and the present law is Section 10-0303. (Emphasis mine.)

---

* *Miller v. California*, ___ U.S. ___., ___ law Ed. 2nd. ___ St. Ct. Rep. ___, June 21, 1973.

Miller sets basic guidelines for the trier of fact and says they *must be:*

> "(a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest, Kois v. Wisconsin, supra, 408 U.S., at 230 (1972), quoting Roth v. United States, supra, 354 U.S. at 489 (1957), (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law, and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value."

Section 10-0303 in no way comports with (b) of the *Miller* case. The case itself, however, thereafter gives concrete examples which could immediately be incorporated into a new City Ordinance and enable the City properly to police and enforce its ordinances. Regulation as required in (b) of the *Miller* case by way of example could be:

> "(a) patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated."
>
> "(b) patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals."
>
> The *Miller* case said:
>
> "Under the holdings announced today, no one will be subject to prosecution for the sale or exposure of obscene materials unless these materials depict or describe patently offensive "hard core" sexual conducts

> specifically defined by the regulating state law, as written or construed. We are satisfied that these specific prerequisites will provide fair notice to a dealer in such materials that his public and commercial activities may bring prosecution."

Section 10-0303 is not specific. It is overly broad in that it also prohibits the purchase of the enumerated items and their possession in the privacy of one's home, a violation of the First Amendment. Stanley v. Georgia, 394 U.S. 561, 89 S.Ct. 1243 (1969).

The effect of the *Miller* case is to ease the prosecutor's burden and as a general proposition now makes it easier to convict Defendants, and because of this these Defendants cannot be prosecuted under the *Miller* definition since this would operate *ex post facto,* which the due process clause forbids, Bouie v. City of Columbia, 378 U.S. 347 (1964).

The First and Fourteenth Amendments are violated by the wording of Section 10-0303, it is therefore unconstitutional. The City of Fargo must have modern ordinances to cope with this problem and the Miller case provides a sound base for such ordinances.

For the reasons assigned herein, the defense motion to dismiss must be, and is, hereby granted.

This decision, since it is based on matters of law, is not a victory for the Defendants nor a defeat for the City. It is a reminder that this is 1973, and that a new and sound law is required to enable prosecutors and lawmen alike to do their jobs well, and to put the citizenry on

notice as to what is, and what is not, lawful in respect of pornography and obscenity.

Dated: August 9, 1973.

/s/
Thomas A. Davies
Judge of the Municipal Court

IN THE COUNTY COURT OF
POLK COUNTY, FLORIDA

STATE OF FLORIDA	)	
	)	
v.	)	Case No. MM73-2922
	)	
LEE HALL and	)	
WILLIAM LARRY MORRISON	)	
	)	
	)	

ORDER GRANTING MOTION TO DISMISS
AND MOTION TO QUASH

This matter came on for hearing upon the Motion to Dismiss and the Motion to Quash filed on behalf of the defendants. The State was represented by the Honorable J. Norman White, Esquire, Assistant State Attorney and the defendants were represented by the Honorable Richard Barest, Esquire.

The defendants urge the Court to declare Chapter 73-102, Laws of Florida, 1973, to be unconstitutional in view of the recent decision of the United States Supreme Court in *Miller v. California,* No. 70-73, decided June 21, 1973. In *Miller,* the Court held:

> "As a result, we now confine the permissible scope of such regulation to works which depict or describe sexual conduct. That conduct must be specifically defined by the applicable state law as written or authoritatively construed."

* * *

> "Under the holdings announced today, no one will be subject to prosecution for the sale or exposure of obscene materials unless these materials depict or describe patently offensive "hard core" sexual conduct specifically defined by the regulating state law, as written or construed. We are satisfied that these specific prerequsites will provide fair notice to a dealer in such materials that his public and commercial activities may bring prosecution."

In viewing the entirety of Chapter 73-120 against *Miller* standards it is apparent that the statute does not specifically define the sexual conduct, the portrayal of which the statute seeks to prohibit. The statute, given its normal meaning, is so broad that its penal sanctions may apply to conduct protected by the First Amendment to the United States Constitution.

The Court was urged by the state to read *Miller* limitations into Chapter 73-120, however, the Court is of the view that to do so would encroach on the province of the legislative branch of government.

In declining to read *Miller* limitations into Chapter 73-120, the Court is aware of, and did consider, the unreported case of *Papp v. State,* District Court of Appeal, Fourth District, a case involving Section 847.011(1)(a), Florida Statutes 1969.

Pursuant to the provisions of Section 2 of Chapter 73-120, the State filed a Motion for the entry of an order requiring the defendants to produce a reel of film entitled

"Deep Throat." The Court entered the requested order, and subsequently the defendants, under protest, produced said film, and a viewing was held on August 6, 1973. The defendants subsequently filed a Motion directed toward the Court's order to produce, alleging alternatively that Section 2 is either unconstitutional of that the defendants are now immunized from prosecution by virtue of the provisions of Section 914.04, Florida Statutes, the so-called immunity statute.

It is the Court's view that Section 2 of Chapter 73-120 is violative of the provisions of the Amendments IV, V and XIV of the United States Constitution, and of Sections IX and XII, Article 1, Declaration of Rights of the Constitution of Florida.

Further, the Court determines that the compulsory production, pursuant to Court order, of the film entitled "Deep Throat," (the alleged showing of which gave rise to the instant prosecution), and the subsequent viewing of said film by the Court, over the objection of the defendants, resulted in the defendants, and each of them, being immunized from further prosecution for the showing of said film by virtue of the provisions of Section 914.04, Florida Statutes.

Having determined that Chapter 73-120 is unconstitutional, the Court need not rule on the question of whether said viewing established probable cause to believe that "Deep Throat" is "obscene."

In holding Chapter 73-120 to be unconstitutional, the Court is mindful that the severability provisions contained in Section 4 of said statute purports to breathe life back into Polk County Ordinance No. 73-4, an ordinance relating

to the distribution, etc., of obscene material. Although Ordinance 73-4 is not before this Court in this action, the constitutionality of the ordinance is before the Court in the case of the *State of Florida v. Earl F. Simpson and Charles A. Hatchett.* These cases are scheduled for hearing at 8:00 a.m. on Friday, August 17, 1973, and as a caveat to law enforcement agencies within this county, the Court observes that Ordinance 73-4 may suffer from the same constitutional infirmities as Chapter 73-120.

For the foregoing reasons, it is

ORDERED AND ADJUDGED that Chapter 73-120, Laws of Florida 1973, is unconstitutional as applied to these defendants as denying to them due process of law as guaranteed to them by Amendment No. XIV of the Constitution of the United States and by Section 9, Article 1, Declaration of Rights of the Constitution of the State of Florida.

And, alternatively, it is further

ORDERED AND ADJUDGED that Chapter 73-120, Laws of Florida 1973, is unconstitutional per se, that is, on its fact, as being unconstitutionally vague and over broad in violation of Amendments I and XIV of the Constitution of the United States, and in violation of Sections 4 and 9, Article 1, Declaration of Rights of the Constitution of the State of Florida. And, alternatively, it is further

ORDERED AND ADJUDGED that the defendants, and each of them, have been immunized from further prosecution for the showing of a certain film entitled "Deep Throat," by virtue of the provisions of Section 914.04, Florida Statutes. And, alternatively, it is further

ORDERED AND ADJUDGED that Section 2 of Chapter 73-120, Laws of Florida 1973, is unconstitutional as

being in violation of Amendments IV, V and XIV of the United States Constitution, and in violation of Sections 9 and 12, Article 1, Declaration of Rights of the Constitution of the State of Florida. It is further

ORDERED AND ADJUDGED that the Motion to Quash the Court's Order to Produce dated August 3, 1973, and to Discharge Defendants from Further Prosecution, be and the same is hereby GRANTED. It is further

ORDERED AND ADJUDGED that the Motion to Dismiss the Information, be and the same is hereby GRANTED, and the defendants Lee Hall and William Larry Morrison are hereby discharged from further prosecution herein.

DONE AND ORDERED at Bartow, Polk County, Florida, this 15th day of August, 1973.

/s/
William A. Norris, Jr.
County Judge

[Certificate of Service omitted in printing]

IN THE IOWA DISTRICT COURT
IN AND FOR LINN COUNTY

STATE OF IOWA,	)	
	)	Nos. IM Nos. illegible
v.	)	
DALE LAVIN; EDWARD J.	)	
WEDENSTED: EDWARD	)	
WEDELSTEDT, D/B/A	)	
DANISH rest illegible	)	
	)	
Defendants.	)	

This case comes before the Court on a Supplemental Demurrer filed by the defendants. The defendants are all charged with violating Section 725.5 of the Code of Iowa, Obscene Literature – Articles For Immoral Use. Two of the charges arose in 1971, two in 1972, and two in 1973; however, the cases have all been consolidated into one court file and are being treated as one at this time. This case has a confusing history. The two oldest charges were appealed to the Iowa Supreme Court following an overruling of the Demurrer, a judgment and sentencing in this Court when it was the Cedar Rapids Municipal Court. The Iowa Supreme Court in *State v. Lavin*, 204 N.W.2d 844 (Iowa, 1973) reversed and remanded holding the original Demurrer should have been sustained since the Information did not allege scienter. On remand, the old Informations were amended. By this time two other charges had been filed and shortly after the Iowa Supreme Court ruling the last two charges were filed. A number of Motions have been filed and ruled on in these cases, but this Court will not

attempt to deal with the history of those. On March 29, 1973, the defendants again Demurred the charges in all cases. Hearing on the Demurrer was delayed pending rulings of the United States Supreme Court in similar cases. Subsequent to the U.S. Supreme Court rulings in a quintet of "obscenity" cases the defendants filed a Supplemental Demurrer on July 10, 1973. Oral arguments on the Supplemental Demurrer were heard before this Court on July 19, 1973. Since the defendants chose to argue only the Supplemental Demurrer, this Court will now rule on only the Supplemental Demurrer.

FINDINGS AND RULING

The defendants in this case Demurrer to the charges filed against them under Section 725.5 of the Code of Iowa on the following grounds:

(1) The U.S. Supreme Court tuling in *Miller v. California*, ____ U.S. ____, 13 CR. L. 3161, 41 L.W. 4925, (1973), causes §725.5 of the Code of Iowa to be overbroad, vague, indefinite, in violation of defendants' First and Fourteenth Amendment constitutional rights;

(2) that the Iowa Supreme Court has authoritatively construed the Iowa statute in such a way that it could be found constitutional under *Miller v. California, supra;*

(3) and were this Court to authoritatively construe Section 725.5 any attempt to apply such construction retroactively to these defendants would present an unconstitutional *ex post Facto* situation within the meaning of *Bouie v. City of Columbia*, 378 U.S. 348 (1964).

In answering defendants' Supplemental Demurrer, the State argues that these issues have previously been decided by the Iowa Supreme Court in *State v. Lavin*, 204 N.W. 2d 844 (Iowa, 1973).

This Court now sustains defendants' Supplemental Demurrer on grounds (1) and (2) stated above for reasons which follow. No ruling is made as to ground (3) since it becomes a moot question when grounds (1) and (2) and sustained.

The U.S. Supreme Court in *Miller v. California, supra,* saw fit to re-examine standards they had set in earlier decisions relating to "obscenity – pornography" cases. In so doing they found that previous standards were not working. Thus, they abandoned the earlier tests and established new safeguards for the regulation of obscene materials. The Court does hold the obscenity can be regulated. And in a companion case to *Miller, Paris Adult Theatre I v. Slaton,* ___ U.S. ___, 13 CR. L. B171, 41 L.W. 4935 (1973), the Supreme Court holds that states do have a legitimate interest in regulating commerce in obscene material, which includes the sale and exposure of such materials to consenting adults. They also reaffirm the *Roth v. United States,* 354 U.W. 476 (1957), holding that obscene material *is not* protected by the First Amendment. (Emphasis added). However, the applicable state law as written or authoritatively construed, under which such materials are regulated, must comply with the First Amendment standards set forth in *Miller v.. California, supra.* Section 725.5 of the Code of Iowa as written does not comply with the standards set by *Miller.* Nor has that Section been "authoritatively construed" to include the *Miller* safeguards. *Miller* says that state statutes which regulate obscene material must be carefully limited. And,

"As a result, we now confine the permissible scope of such regulation to works which depict or describe sexual conduct. That conduct must be specifically defined by the applicable state law, as written or authoritatively construed. A state offense must also be limited to works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value". *Miller v. California,* 13 CR. L. at 3163.

And further that,

"Under the holdings announced today, no one will be subject to prosecution for the sale or exposure of obscene materials unless these materials depict or describe patently offensive "Hard core" sexual conduct specifically defined by the regulating state law, as written or construed. We are satisfied that these specific prerequisites will provide fair notice to a dealer in such materials that his public and commercial activities may bring prosecution". *Miller v. California,* 13 CR. L. at 3164.

Section 725.5 of the Code of Iowa under which these Informations are filed provides that:

"Obscene literature – articles for immoral use. Whoever sells, or offers for sale . . . or has in his possession with intent to sell . . . any obscene, lewd, indecent, lascivious, or filthy book, pamphlet, paper, drawing, lithograph, engraving, picture, photograph, writing,

> **card, postal card, model, cast, or any instrument or article of indecent or immoral use . . . shall be guilty of a misdeamenor . . ."**

Nowhere does this statute define what is obscene, lewd, etc. Nowhere does it regulate the depicting or describing of sexual conduct as required by *Miller, supra.* Nor has the Iowa statute ever been "authoritatively construed" to regulate only that specific depiction or description of sexual conduct. For that reason this Court holds that Section 725.5 of the Code of Iowa is unconstitutional since it fails to comply with the constitutional standards set out by *Miller v. California.*

Further in answer to the argument of the State that *State v. Lavin, supra,* decided the constitutionality of Section 725.5, this Court particularly agrees. *State v. Lavin,* decided the constitutionality of Section 725.5 of the Code of Iowa in light of the law at the time it was decided. In February of this year, Section 725.5 was constitutional; now, in August, it is not. In *State v. Lavin,* the Iowa Supreme Court said, "The decisions of the United States Supreme Court also make plain that a state statute like ours will stand if the courts of the state incorporate the *Memoirs* requirements in the application of statute." This they did and then held the Iowa statute valid. However, the U.S. Supreme Court has now abandoned *Memoirs v. Mass.*, 383 U.S. 413 (1966) and its tests, in particular the test of "utterly without redeeming social value". No member of the U.S. Supreme Court today supports the *Memoirs* formulation. *Miller,* 13 CR.L. at 3163. Without the *Memoirs* test to rely on the Iowa statute is without support and therefore becomes impermissibly vague for the reasons stated above.

In place of the *Memoirs* tests, Miller sets basic guidelines for the trier of fact. They are:

> (1) "Whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest;
>
> (2) whether the work depicts or described in a patently offensive way, sexual conduct specifically defined by the applicable state law; and,
>
> (3) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value." *Miller*, 13 CR. L. at 3164.

The community standards to be used are no longer national standards, but those of the local community. In effect, these guidelines should make it easier to prosecute and convict defendants under obscenity laws since the prosecution no longer has to prove the material to be "utterly without redeeming social value", a negative which was difficult if not impossible to prove. Therefore, to prosecute these defendants under the *Miller* definition of obscenity, and to instruct the jury under *Miller*, would be a functional equivalent of a prohibited *ex post facto* application of the law. *Bouie v. City of Columbia*, 378 U.S. 347 (1964).

In accordance with the above, this Court now holds that Section 725.5 of the Code of Iowa is unconstitutional and unenforceable in light of *Miller v. California, supra*. The defendants' Supplemental Demurrer is sustained as to Paragraph 2 and 3, and

IT IS ORDERED that all the Infromations be dismissed against all the defendants captioned above. Bond exonerated.

Dated this 13th day of August, 1973, at Cedar Rapids, Linn County, Iowa.

/s/ Lynne E. Brady
District Associate Judge

CC: Linn County Attorney
David Mitchell

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1060

VILLAGE BOOKS, INC., ET AL.,
Petitioners,

v.

ARTHUR MARSHALL, JR.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

BRIEF IN OPPOSITION

PRELIMINARY COMMENTS

This Brief in Opposition to the Petition For Writ of Certiorari to the Court of Appeals of Maryland is filed pursuant to the request of this Honorable Court.

OPINION BELOW

The opinion of the Court of Appeals of Maryland on October 13, 1971, No. 37, Sept. Term, 1971, 263 Md. 76, 282 A.2d 126, cert. granted by the Supreme Court of the United States. Judgment vacated June 25, 1973, and cause remanded for further consideration in light of *Miller v. California*, 413 U.S. 15, 93 S. Ct. 2607 (1973), and its companion

cases; judgment reinstated and reaffirmed by Order of the Court of Appeals of Maryland on October 10, 1973.

JURISDICTION OF THE COURT

Respondent admits that this Honorable Court has jurisdiction over the petition sought by Petitioners.

QUESTIONS PRESENTED FOR REVIEW

I. Is the statute, art. 27, §§ 418 and 418A, MD. ANN. CODE, unconstitutional?

II. Are the five magazines, "Sex Confidential," "Masturbation and Youth," "Auto Fellatio and Masturbation," "Ted and Blair," and "Allen and Jim," obscene in the constitutional sense without the Maryland Code specifically defining "obscenity"?

III. Is Prince George's County, Maryland, the proper community to be considered in determining whether or not books and magazines exceed contemporary community standards of candor in the expression of sexual matters in erotic literature, or is proof of a state-wide or national community standard mandatory?

CONSTITUTIONAL PROVISIONS INVOLVED

Petitioners allege that the First and Fourteenth Amendments to the Constitution of the United States of America are involved.

STATEMENT OF THE CASE

The State's Attorney for Prince George's County, Arthur A. Marshall, Jr., brought an action against Petitioners, Village Books, Inc., and Gary Wahl, under MD. ANN. CODE art. 27, § 418A (Petitioners' App. 23a, 24a and 25a), which provide that the State's Attorney may seek injunctive relief

against any person, firm, or corporation who sells or is about to sell obscene material.

An amendment to the pleadings resulted in the State's Attorney introducing into evidence without objection twenty-one magazines which were marked "Plaintiff's Exhibits Nos. 1-21." These exhibits were received by the court. The State alleged that each publication was obscene under the Maryland statute and was not protected by the First Amendment to the United States Constitution. After the State had introduced the exhibits into evidence and it was stipulated that they were included in the material which Petitioners would be selling at their adult book store in Prince George's County, the State rested. Petitioners moved the Court to dismiss the complaint, and the motion was denied.

Petitioners called two witnesses, one of whom was a psychiatrist who was tendered as an expert in psychiatry. He testified that he did not believe that any of the material was "necessarily an appeal to the prurient interest." The second witness was a man who was in the business of distributing this type of material, and he went through the list of the twenty-one exhibits and gave the numbers of copies that were originally printed, which ranged from five thousand up to more than twenty thousand.

During the argument by Petitioners, the State agreed that it was relying on the fact that the twenty-one exhibits were hard-core pornography and that, as a result, their distribution could be restricted by criminal or civil proceedings. Also, during the argument, Petitioners were asked, "You are claiming these Supreme Court cases [*Redrup v. New York, Austin v. Kentucky, Gent v. Arkansas*, 386 U.S. 767, 18 L. Ed. 2d 515, 87 S. Ct. 1414 (1967) (consolidated); and *Bloss v. Dykema*, 398 U.S. 278, 26 L. Ed. 2d 230, 90 S. Ct. 1727 (1970)] that you have cited, in effect,

hold that hard-core pornography is protected by the First Amendment and therefore not illegal under any kind of statute unless it involves the pandering aspect of *Ginzburg* [*v. United States*, 383 U.S. 463, 16 L. Ed. 2d 31, 86 S. Ct. 942 (1966)] or the juvenile aspects of the other *Ginsberg* [*v. New York*, 390 U.S. 629, 20 L. Ed. 2d 195, 88 S. Ct. 1274 (1968)] case," to which counsel for Appellant replied, "Yes, sir. Since *Redrup* that is the position as far as the Supreme Court cases and the cases which I cited to Your Honor which were three-judge United States District Courts."

The Court then took the case under advisement and on February 8, 1971, rendered its opinion, holding that eighteen of the twenty-one books were obscene in that they were hard-core pornography, and no expert testimony was required as to Exhibits Nos. 1-12, 16, and 17-21. The Court concluded that the impression of obscenity was so strong that expert testimony to support this impression was unnecessary, and if there were expert testimony to the contrary, it simply could not be given enough weight to overcome the strong impression that it was obscene.

In assaying the presence of the three elements — namely, that the dominant theme of the material taken as a whole appeals to a prurient interest in sex, the material is patently offensive because it affronts the contemporary community standards relating to description and representation of sexual matters, and the material is utterly without redeeming social value — the Court found that the dominant theme of Exhibits Nos. 1-11 appealed to the prurient interest in sex generally because they involved nude males and nude females with genitals fully exposed. No. 12 depicted males in various acts of masturbation, and, with the exceptions of Nos. 13, 14, and 15, the remaining exhibits, Nos. 16-21, clearly defined deviant sexual groups, namely, male homosexuals; that, with

the exceptions of Nos. 13, 14, and 15, all twenty-one exhibits were patently offensive and affronted the contemporary community standards, i.e., the same community from which jurors would be drawn to decide any factual issues involved in any case before the Court, namely, Prince George's County; and finally, although in some of the exhibits there was some printed material in addition to the photographs, the Court was unable to find that the printed material had any redeeming social value whatsoever and, in fact, found that it had an exacerbating effect on an appeal to the prurient interest rather than any redeeming effect and that it was neither artistically, scientifically, nor literarily of any redeeming value whatsoever.

On March 3, 1971, Petitioners appealed the decision of the lower court to the Court of Appeals of Maryland. That Court, on October 13, 1971, filed its opinion (263 Md. 76, 282 A.2d 126) in which it held that § 418A of art. 27, MD. ANN. CODE, was constitutional in that, except in irrelevant detail, it was a carbon copy of the New York Statute, § 22-a of the New York Code of Criminal Procedure, which had been held to be constitutional by this Honorable Court in *Kingsley Books v. Brown*, 354 U.S. 436 (1957). The Court of Appeals of Maryland also found that the five books and magazines, "Sex Confidential," "Masturbation and Youth," "Auto Fellatio and Masturbation," "Ted and Blair," and "Allen and Jim," were obscene and were hard-core pornography, the distribution of which could be restricted within the framework of the Constitution of the United States. As to the five books enumerated above, the Court of Appeals of Maryland affirmed the decision of the lower court.

Petitioners prayed this Honorable Court to issue a writ of certiorari to review the judgment of the Court of Appeals of Maryland entered in the above-entitled case on October 13,

1971. This Honorable Court, on June 25, 1973, granted the petition for a writ of certiorari, vacated the judgment, and remanded the case for further consideration in light of *Miller v. California*, 413 U.S. 15, 93 S. Ct. 2607 (1973), and its companion cases, decided June 21, 1973. The Court of Appeals of Maryland, on October 10, 1973, reaffirmed its previous decision of October 13, 1971. On January 7, 1974, Petitioners prayed this Honorable Court to grant a writ of certiorari to review the decision of the Court of Appeals of Maryland; and this Honorable Court, on February 22, 1974, requested Arthur Marshall, Jr., State's Attorney for Prince George's County, Respondent, to reply to that petition.

ARGUMENT

I.

MD. ANN. CODE ART. 27, §§ 418 AND 418A ARE CONSTITUTIONAL.

In *Miller v. California*, 413 U.S. 15, 93 S. Ct. 2607, 2613 (1973), this Honorable Court quoted from *Roth v. United States*, 354 U.S. 476, 484-85, 77 S. Ct. 1304, 1309, 1 L. Ed. 2d 1498 (1957), as follows:

> "We hold that obscenity is not within the area of constitutionally protected speech or press,"

and stated, 93 S. Ct. at 2614-15:

> "This much has been categorically settled by the Court, that obscene material is unprotected by the First Amendment. . . . We acknowledge, however, the inherent dangers of undertaking to regulate any form of expression. State statutes designed to regulate obscene materials must be carefully limited. See Interstate Circuit, Inc. v. Dallas, 390 U.S. [676], 682-85, 88 S. Ct. [1298], 1302-1305 (1968). As a result, we now confine the permissible scope of such regulation to works which depict or describe sexual conduct. That conduct must be specifically defined by the applicable state law, as written or authoritatively construed.[6] A state offense must also

be limited to works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value. [Citations omitted; footnote omitted.]

"6. See, *e.g.*, Oregon Laws 1971, c. 743, Art. 29, §§ 255-262, and Hawaii Penal Code, Tit. 37, §§ 1210-1216, 1972 Hawaii Session Laws, pp. 126-129, Act 9, Pt. II, as examples of state laws directed at depiction of defined physical conduct, as opposed to expression. Other state formulations could be equally valid in this respect. In giving the Oregon and Hawaii statutes as examples, we do not wish to be understood as approving of them in all other respects nor as establishing their limits as the extent of state power.

"We do not hold, as Mr. Justice Brennan intimates, that all States other than Oregon must now enact new obscenity statutes. Other existing state statutes, as construed heretofore or hereafter, may well be adequate. See United States v. 12-200 Ft. Reals Film, ... U.S. ....., p. ....., n. 7, 93 S. Ct. 2665, p. 2670, n. 7, 36 L. Ed. 2d ..... (1973)."

Over the years the appellate courts of Maryland have construed the meaning of obscenity as contained in the Maryland statutes. In 1965 the Court of Appeals of Maryland, in *Dunn v. Maryland Board of Censors*, 240 Md. 249, 254-55 (1965), said:

"We hold that the right and power of the [Maryland Board of Censors] to ban films as 'obscene' or as tending 'to debase or corrupt morals' under Sec. 6 of Art. 66A extends only to motion pictures which are obscene under the *Roth* test referred to and paraphrased in *Trans-Lux* [*Distributing Corporation v. Maryland State Board of Censors*, 240 Md. 98 (1965)] and in this decision. . . .

". . .

". . . We think it plain that save in the rare case where there could be no doubt that the film is obscene the

> Board will not meet the burden of persuasion imposed on it by the Constitution and the statute without offering testimony that the picture is obscene in that (a) the average person, applying community standards, would find that its dominant theme, taken as a whole, appeals to prurient interest, (b) that the film goes substantially beyond customary limits of candor in description or representation of sex or other matters dealt with, and (c) that it is subject to proscription because it is utterly without redeeming social importance considered in light of the fact that '* * * sex and obscenity are not synonymous,' *Roth*, 354 U.S. 476, 487, 1 L. Ed. 2d 1498, 1508, and the fact that material dealing with sex in a manner that advocates ideas or has literary, scientific or artistic value or any other form of social importance may not be branded as obscenity."

In *Sanza v. Maryland Board of Censors*, 245 Md. 319, 338-39, 226 A.2d 317 (1967), the Court of Appeals of Maryland, speaking of MD. ANN. CODE art. 66A, § 6 (1957), which provided that the Maryland Board of Censors should disapprove such films as are obscene, stated:

> "The only valid standard for disapproval of a film under the Act, therefore, is obscenity. As *Dunn* [*v. Maryland Board of Censors, supra*] makes clear, that standard is limited to what can be deemed obscene in the constitutional sense. The term is not susceptible of definition, any more than is the loftier concept of due process of law, but it is an inherent part of our system of constitutional government that broad concepts take on definite meaning only as the ground covered by the concept is marked out case by case. . . .
>
> ". . .
>
> "Section 6(a) of the Act states that the Board shall disapprove such films 'as are obscene.' The other reasons for disapproval which follow are stated in the disjunctive. Section 6(b) deals with what films are to be considered obscene. While some of the criteria which follow are impermissibly vague, the legislative intent to authorize

the Board to disapprove films which are obscene by any valid test seems clear. In the recent cases before us, the Board has demonstrated that, in practice, the 'obscene' standard of Section 6 can be treated as severable by limiting its findings of obscenity in accordance with the *Roth-Alberts* criteria, as the Board understands them."

Prior to stating this, the Court of Appeals of Maryland had stated, at 326-27, as follows:

"The *Roth-Alberts* test of obscenity, *Roth v. United States*, 354 U.S. 476 (1957), reiterated in *Jacobellis v. Ohio*, 378 U.S. 184 (1964), is summarized in *A Book Named 'John Cleland's Memoirs of a Woman of Pleasure' v. Attorney General* (the 'Fanny Hill' decision), 383 U.S. 413, 418, 16 L. Ed. 2d 1, 5-6 (1966) as follows:

> 'We defined obscenity in *Roth* in the following terms: "[W]hether to the average persons, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest." 354 U.S. at 489. Under this definition, as elaborated in subsequent cases, three elements must coalesce: it must be established that (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value.' "

On June 6, 1969, the Court of Appeals of Maryland, in *Hewitt v. Maryland State Board of Censors*, 254 Md. 179, 182-83, stated as follows:

"Our definition of obscenity — the *Roth-Alberts* test — was restated with somewhat different emphasis perhaps, by the Supreme Court in *A Book Named 'John Clelands' Memoirs of A Woman of Pleasure' v. Attorney General*, 383 U.S. 413, 418, 86 S. Ct. 975, 977, 16 L. Ed. 2d 1, 5-6 (1966), hereinafter referred to as Memoirs,

in which Mr. Justice Brennan, for the Supreme Court, stated:

> 'We defined obscenity in *Roth* in the following terms: "[W]hether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest.' 354 U.S. at 489. Under this definition, as elaborated in subsequent cases, three elements must coalesce: it must be established that (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value.'
>
> "We recognized and applied this latest statement of the applicable rule in *Sanza v. Maryland State Board of Censors*, 245 Md. 319, 326-27, 226 A.2d 317, 320-21 (1967), in which we sustained the Circuit Court and the Board in their finding that certain films, shown in an arcade in 'the Block' in Baltimore, were obscene."

The above definition in Maryland of "obscenity" was reiterated in *Wagonheim v. Maryland State Board of Censors*, 255 Md. 297, 304-05 (1969), on October 22, 1969.

In *Hewitt v. Maryland State Board of Censors*, *supra* at 196-97, the Court of Appeals of Maryland took the opportunity to define what that court considered to be "hard-core pornography," as follows:

> "In our opinion, the most apt definition of 'hard core pornography' we have seen is that given by Judge Fuld of the Court of Appeals of New York in *People v. Richmond County News, Inc.*, 9 N.Y.2d 578, 216 N.Y.S. 2d 369, 175 N.E.2d 681 (1961), cited with approval by the Court of Special Appeals in *Levin v. State*, 1 Md. App. 139, 145, 228 A.2d 487, 489 (1967), *cert. denied*, 389 U.S. 1048, 88 S. Ct. 767, 19 L. Ed. 2d 840 (1968):

> 'It [hard core pornography] focuses predominantly upon what is sexually morbid, grossly perverse and bizarre, without any artistic or scientific purpose or justification. Recognizable "by the insult it offers, invariably, to sex, and to the human spirit" * * *, it is to be differentiated from the bawdy and the ribald. Depicting dirt for dirt's sake, the obscene is the vile, rather than the coarse, the blow to sense, not merely to sensibility. It smacks, at times, of fantasy and unreality, of sexual perversion and sickness and represents, * * * "a debauchery of the sexual faculty." ' (9 N.Y.2d at 587, 216 N.Y.S.2d at 376, 175 N.E.2d at 686)."

On February 9, 1971, one day after Judge Powers rendered his opinion in which he held that eighteen of the twenty-one books were obscene, the Court of Special Appeals of Maryland rendered its decision in *Woodruff v. State*, 11 Md. App. 202 (1971), where it set forth what at that time the courts of Maryland had construed to be the definition of "obscenity" in MD. ANN. CODE art. 27, §§ 418 and 418A. Judge Moylan, speaking for the Court, stated, at 205:

> "It is also clear that the courts, trial and appellate, of this State are bound by the definition of obscenity as enunciated by the Supreme Court of the United States and that the Maryland Legislature intended by its use of the word 'obscene' to connote that which the word 'obscene' means in prevailing leading legal thought. *Donnenberg v. State* [1 Md. App. 591], at 597, and *Levin v. State* [1 Md. App. 139], at 143. That a state legislature's or state court's definition of 'obscene' may not be broader than that constitutionally permitted by the First and Fourteenth Amendments was made clear in *Mishkin v. New York*, 383 U.S. 502, 507-508:
>
> > 'States are free to adopt other definitions of obscenity only to the extent that those adopted stay within the bounds set by the constitutional criteria of the *Roth* definition, which restrict the regulation

of the publication and sale of books to that traditionally and universally tolerated in our society.' "

The court, in that opinion, went on to say, at 214-15:

"The standard we are to apply was recited initially in *Roth v. United States* and *Alberts v. California*, 354 U.S. 476, reiterated in *Jacobellis v. Ohio* [378 U.S. 184], elaborated in *Ginzburg v. United States* 333 U.S. 463, adjusted in *Mishkin v. New York* [383 U.S. 502], and summarized in *A Book Named 'John Cleland's Memoirs of a Woman of Pleasure' v. Attorney General* (the *Fanny Hill* decision), 383 U.S. 413. (Hereinafter, this entire formula will be referred to simply as the *Roth* test.) *Dillingham v. State* [9 Md. App. 669]; *Lancaster v. State* [7 Md. App. 602]; *Donnenberg v. State* [1 Md. App. 591]; *Levin v. State* [1 Md. App. 139].

To come within the definition of obscenity, under that standard:

'Three elements must coalesce; it must be established that:

1) The dominant theme of the material taken as a whole appeals to a prurient interest in sex.
   a) where the material is designed for and primarily disseminated to a clearly defined deviant sexual group, rather than the public at large, the prurient-appeal requirement is satisfied if the dominant theme of the material taken as a whole appeals to the prurient interest in sex of the members of that group.
2) The material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters.
3) The material is utterly without redeeming social value.

Each of the above three federal constitutional criteria must be applied independently and neither be weighed against nor canceled by any of the others.

a) As an aid to determining the question of obscenity, the setting in which the material was presented may be considered. Thus evidence of pandering — "the business of purveying textual or graphic matter openly advertised to appeal to the erotic interest — is relevant" and "where a purveyor's sole emphasis is on the sexually provocative aspects of his publications, a court could accept his evaluation on its face value." ' *Dillingham v. State, supra* 672."

Thus it is evident that at the time Petitioners' case was heard in Prince George's County, and decided on appeal by the Court of Appeals of Maryland on October 13, 1971, the appellate courts of the State of Maryland not only had fully defined and construed the meaning of the word "obscene" within the provisions of MD. ANN. CODE art. 27, §§ 418 and 418A, but also had described what "hard-core" pornography was within the State of Maryland. It is true that the Court of Appeals of Maryland had established within the State a definition of obscenity which contained three elements, all three of which had to coalesce. These were (1) that the dominant theme of the material taken as a whole had to appeal to a prurient interest in sex, and (2) that the material had to be patently offensive because it affronted the contemporary community standards relating to the description or representation of sexual matters, and (3) that the material was utterly without social value. This was the test applied by the Court of Appeals of Maryland in *Village Books, Inc., et al. v. State's Attorney for Prince George's County*, 263 Md. 76 (1971). By the use of this definition of obscenity, the Court of Appeals of Maryland determined Exhibits Nos. 8, 12, 13, 15, and 17 to be hard-core pornography and obscene (263 Md. at 89-90). That determination at that period of time in the appellate court's definition of obscenity,

as determined by its interpretation of the Supreme Court decisions applicable at that time, included a requirement that the material be "utterly without redeeming social value," which requirement was later found by this Honorable Court, in *Miller v. California, supra*, to be not required.

In both *Miller v. California, supra*, and *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 93 S. Ct. 2628 (1973), a civil proceeding under a Georgia statute which permitted the enjoining of the exhibition of materials found to be obscene, a provision similar to that of MD. ANN. CODE art. 27, § 418A, this Honorable Court stated that the definition of "obscenity" could be either specifically provided by the state statute or as construed by the state courts. The Maryland appellate courts have construed what "obscenity" means within the State since *Miller*. In *Ebert v. Maryland State Board of Censors*, 19 Md. App. 300, 314-15 (1973), the Court of Special Appeals of Maryland stated:

> "The Supreme Court having jettisoned the Memoirs formulation of the *Roth* standard of obscenity, it is no longer a valid test for this State to follow. We discard it as burdensome, unworkable and unwanted. We turn to *Miller* and its siblings for the current standard of obscenity, and construe 'obscene' as used in Art. 66 A in the light of those cases, not merely because the Supreme Court has said it is prepared to do so with respect to federal statutes, *12 200-Ft. Reels, supra*, and not merely because it has indicated the States are free to do so with respect to State statutes, *Miller, supra*, but primarily because the Court of Appeals of Maryland has declared that it is clear that the legislative intent was to authorize the Board to disapprove films which are obscene by any valid test.' *Sanza v. Maryland Board of Censors, supra*, at 339. We therefore construe the statute as commanding the Board to disapprove any film or view which:
>
> (1) portrays sexual conduct in a patently offensive way in that it contains patently offensive:

(a) representations or descriptions of ultimate sex acts, normal or perverted, actual or simulated; OR

(b) representations or descriptions of masturbation, excretory functions, and lewd exhibitions of genitals; AND

(2) taken as a whole:

(a) would be found by the average person, applying contemporary community standards of the State, to appeal to the prurient interest in sex; AND

(b) does not have serious literary, artistic, political, or scientific value." (Footnote omitted.)

When this Honorable Court granted the certiorari previously asked by Petitioners and remanded the case to the Court of Appeals of Maryland for further consideration in light of *Miller v. California, supra*, this Honorable Court was not disapproving MD. ANN. CODE art. 27, §§ 418 and 418A but, rather, was returning the case to the Court of Appeals of Maryland to determine whether the applicable Maryland law, as written or authoritatively interpreted by the Maryland courts, met the First Amendment standards set forth in *Miller v. California*, 93 S. Ct. at 2614-16, and *Paris Adult Theatre I v. Slaton*, 93 S. Ct. at 2642. Upon receipt of this case by the Court of Appeals of Maryland, that court reviewed the case in light of the decisions in *Miller* and its siblings and reaffirmed its previous decision. By its action, the Court of Appeals of Maryland tested the material under the standards laid down in *Miller* as they differ from the *Roth-Alberts* test previously applied in the State. The appellate courts in Maryland have already reiterated that the definition of "obscenity" was that set forth by the Supreme Court of the United States, and hard-core pornography that set forth by Judge Fuld of the Court of Appeals of New York.

The Court of Appeals of Maryland, by reaffirming its previous decision, tested the materials contained in Exhibits Nos. 8, 12, 13, 15, and 17 under the criteria set forth in *Miller v. California, supra,* and found them to be "obscene" under that test. As a result of that decision, the Court of Appeals of Maryland specifically construed MD. ANN. CODE art. 27, §§ 418 and 418A, and especially the word "obscene" to be that as set forth in *Miller v. California.* The Court of Special Appeals of Maryland has since fully set forth in *Ebert v. Maryland State Board of Censors, supra,* a full construction of the meaning of "obscenity" within the tenets set forth in *Miller.*

The Maryland statute, art. 27, §§ 418 and 418A, having thus been construed and specifically defined by the appellate courts of Maryland within the limits set forth in *Miller v. California, supra,* are therefore constitutional.

II.

THE FIVE MAGAZINES, "SEX CONFIDENTIAL," "MASTURBATION AND YOUTH," "AUTO FELLATIO AND MASTURBATION," "TED AND BLAIR," "ALLEN AND JIM," ARE OBSCENE IN THE CONSTITUTIONAL SENSE.

The five magazines, "Sex Confidential," "Masturbation and Youth," "Auto Fellatio and Masturbation," "Ted and Blair," and "Allen and Jim," are obscene in the constitutional sense because, although the Maryland Code does not specifically define "obscenity," the appellate courts of Maryland have judiciously construed "obscenity."

In remanding the present case to the Court of Appeals of Maryland, this Honorable Court returned all cases which had not reached final adjudication for reexamination in light of its clarification of the previous standards as to obscenity and its declaration of new standards, as set forth in *Miller v. California, supra,* and its sibling cases.

The Court of Appeals of Maryland had already previously determined that the five magazines, "Sex Confidential," "Masturbation and Youth," "Auto Fellatio and Masturbation," "Ted and Blair," and "Allen and Jim," Exhibits 8, 12, 13, 15, and 17, were hard-core pornography and that the particular magazines pertained to sexual matters. By using the *Roth-Alberts* definition of obscenity, the Court of Appeals had determined that, as to each of the magazines, the average person, applying contemporary community standards, would find that the dominant theme of the material taken as a whole appeals to the prurient interest, that the material was patently offensive because it affronted contemporary community standards relating to the description or representation of sexual matters, and that the material was utterly without redeeming social value. The appellate courts of Maryland had previously stated that the word "obscene," as used in the Maryland criminal statute, referred to that which was obscene in the constitutional sense. *Dunn v. Maryland Board of Censors, supra.* Until *Miller v. California*, what was obscene in the constitutional sense was determined by the *Roth-Alberts* test as set forth by the Court of Appeals of Maryland. The Court of Appeals of Maryland consistently applied the *Memoirs* formulation of the *Roth-Alberts* test. It should be noted that Section 311(a) of the California Penal Code, which this Honorable Court was determining in *Miller v. California, supra*, defined the word "obscene" as follows:

> " 'Obscene' means that to the average person, applying contemporary standards, the predominant appeal of the matter, taken as a whole, is to prurient interest, *i. e.*, a shameful or morbid interest in nudity, sex, or excretion, which goes substantially beyond customary limits of candor in description or representation of such matters and is matter which is utterly without redeeming social importance." *Miller v. California, supra* at 2611, n. 1.

This definition in California by statute, had been established in Maryland by the opinions of the highest court of the State, the Court of Appeals of Maryland. The return of the case by this Honorable Court to the Court of Appeals of Maryland required the Court of Appeals to test the five magazines under the *Miller* definition of obscenity in addition to the definition set forth in the *Roth-Alberts* test, as added to by the *Memoirs* test. This is true, as witnessed by the fact that in *Miller v. United States, supra*, this Honorable Court vacated and remanded the conviction for reconsideration in light of the *Miller* series of opinions. The injunction had been under a definition of obscenity using the *Memoirs* standard. The Court of Appeals of Maryland, therefore, in affirming its previous decision, considered the question of obscenity *vel non* and applied the *Miller* standard. Petitioners were therefore given the benefit of the *Miller* standard as well as that of the *Roth-Alberts Memoirs* standard. Consequently, the Court of Appeals of Maryland has construed obscenity in light of the guidelines set down in *Miller v. California, supra*, and using the *Miller* test found that the five magazines — *i.e.*, "Sex Confidential," "Masturbation and Youth," "Auto Fellatio and Masturbation," "Ted and Blair," and "Allen and Jim" — were obscene under the statutes of Maryland.

III.

PRINCE GEORGE'S COUNTY, MARYLAND, WAS THE PROPER COMMUNITY TO BE CONSIDERED IN DETERMINING WHETHER OR NOT THE BOOKS AND MAGAZINES EXCEEDED CONTEMPORARY COMMUNITY STANDARDS IN EXPRESSION OF SEXUAL MATTERS IN EROTIC LITERATURE.

Mr. Chief Justice Burger, in *Miller v. California, supra* at 2618-20, said:

> "When triers of fact are asked to decide whether 'the average person, applying contemporary community standards' would consider certain materials 'prurient,'

it would be unrealistic to require that the answer be based on some abstract formulation. The adversary system, with lay jurors as the usual ultimate fact-finders in criminal prosecutions, has historically permitted triers-of-fact to draw on the standards of their community, guided always by limiting instructions on the law. To require a State to structure obscenity proceedings around evidence of a *national* 'community standard' would be an exercise in futility.

". . .

"It is neither realistic nor constitutionally sound to read the First Amendment as requiring that the people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas, or New York City. People in different States vary in their tastes and attitudes, and this diversity is not to be strangled by the absolutism of imposed uniformity. As the Court made clear in Mishkin v. New York, 383 U.S. 502, 508-509, 86 S. Ct. 958, 963, 16 L. Ed. 2d 56 (1966), the primary concern with requiring a jury to apply the standard of 'the average person, applying contemporary community standards' is to be certain that, so far as material is not aimed at a deviant group, it will be judged by its impact on an average person, rather than a particularly susceptible or sensitive person — or indeed a totally insensitive one." (Citations omitted.)

The reasons given in *Miller* for holding that national standards are not constitutionally required in obscenity cases, and upholding the instructions of the trial judge in using the State of California as the community, do not say that one cannot use the standards of the local community to determine the community standards set forth in *Miller*. The State of Maryland comprises communities with a vast diversity of life styles. Materials which do not offend the community standards of our metropolitan areas might well be regarded as obscene by the standards of some of our rural communities. Moreover, Maryland juries have tradi-

tionally relied on the local rather than state-wide community standards. Since the decision in this case, the Court of Special Appeals of Maryland, in *Ebert v. Maryland State Board of Censors, supra*, has determined that the Maryland statute should be construed so that the material, taken as a whole, in order to be found obscene would have to be found by the average person, applying contemporary community standards of the State, to appeal to prurient interest in sex, as well as the other conditions, which must coalesce. At the time of the initial decision in Prince George's County, the community standard which was to be considered had not been defined by this Honorable Court nor by the highest court of Maryland. It was therefore proper for Judge Powers, in determining the community standards which were to be used, to use the community standards of Prince George's County, Maryland, which was the location where the magazines were to be sold and distributed. As stated in *Miller v. California, supra*, it is neither realistic nor constitutionally sound to read the First Amendment as requiring that the people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas or New York City. It is also neither realistic nor constitutionally sound to read the First Amendment as requiring that the people of Prince George's County accept public depiction of conduct found tolerable in Baltimore City. People in different areas vary in their tastes and attitudes, and this diversity is not to be strangled by the absolutism of imposed uniformity. By applying the Prince George's County community standard, the court was able to judge these magazines by the impact that they would have on the average person in the community where these magazines were to be sold and distributed. The court therefore did not violate the First Amendment to the Constitution of the United States by using the community standards of Prince George's County.

CONCLUSION

The State of Maryland, by its judicial construction of MD. ANN. CODE art. 27, §§ 418 and 418A, has defined the use of the word "obscene" to mean obscenity as set forth by the Supreme Court of the United States. Prior to *Miller v. California, supra*, the judicial construction given in the State was that of *Miller-Alberts Memoirs* test, which included utterly without redeeming social value. Since *Miller*, the judicial construction within the State of obscenity is that which conforms to that given in *Miller*. As stated in *Miller*, so long as the criteria used in determining obscenity within the state courts is limited within the guidelines set forth in *Miller*, then that determination by the state courts does not violate the First Amendment to the Constitution of the United States. Obscenity is not protected within the provisions of the First Amendment and therefore is not protected within the states by the Fourteenth Amendment.

The Court of Appeals of Maryland, in affirming its previous decision in *Village Books v. State's Attorney for Prince George's County, supra*, judicially construed "obscene" to mean henceforth that which was set forth in *Miller* and, using that test, found that the five magazines were obscene within the *Miller* definition. This afforded Petitioners not only the advantages of the *Roth-Alberts Memoirs* test, which it had previously used in its original decision, but also, by its use of the new *Miller* guidelines in its affirmance, gave to the individual Petitioner the advantages of those guidelines in *Miller* which would be most advantageous to Petitioners' cause. Thus, Petitioners have the best of both worlds.

Miller v. California, supra, while authorizing the use of state community standards in determining what is or is not obscenity to the average individual, and denying the use of a national standard, did not deny the use of a local standard.

The purpose of using the community standard was because people in different states vary in their tastes and attitudes and the diversity was not to be strangled by the absolutism of imposed uniformity. As the court stated in *Miller*, the triers of fact are the best individuals to draw on the standards of their communities and to be guided always by limiting instructions on the law. What better community standard to use in this case than the area from whence the jurors are to be drawn, namely, Prince George's County. The holding in *Miller* that the community standards of the State of California, as opposed to national standards, were constitutionally adequate to establish whether a work was or was not obscene did not mean that the contemporary community standards of the circuit wherein the case was being tried — here, Prince George's County — were not constitutionally adequate to meet the *Miller* test for obscenity.

For the foregoing reasons, it is respectfully submitted that the petition for writ of certiorari to the Court of Appeals of Maryland should not be granted.

Respectfully submitted,

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